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No. 06-173

IN THE

Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENTS GILA VALLEY IRRIGATION DISTRICT AND FRANKLIN IRRIGATION DISTRICT

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QUESTION PRESENTED

Whether the Arizona Supreme Court was correct in declining to consider the San Carlos Apache Tribe's claim that a consent decree, entered by the United States District Court for the District of Arizona, is not binding on the Tribe because the United States allegedly inadequately represented the Tribe in the underlying litigation and when negotiating the terms of the consent decree.

CORPORATE DISCLOSURE STATEMENT

The Gila Valley Irrigation District and the Franklin Irrigation District are Arizona municipal corporations facilitating the delivery of water from the Gila River in Graham and Greenlee counties in Arizona. The Irrigation Districts do not issue stock and interests in the Irrigation Districts are not publicly traded.

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STATEMENT OF THE CASE

The Gila Valley Irrigation District and the Franklin Irrigation District (the "Upper Valley Irrigation Districts") incorporate by reference the statement of facts in part I of the opinion below, *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. 64, 67-69, 127 P.3d 882, 885-87 (2006), *reconsideration denied*, 212 Ariz. 470, 134 P.3d 375 (2006); Petitioner's Appendix A at 2a-8a (hereinafter "Petitioner's App.__").

The only issue to be decided is whether the Arizona Supreme Court erred when, on grounds of comity, the Court refused to consider whether the alleged inadequate representation by the United States of the San Carlos Apache Tribe ("Apache Tribe" or "Tribe") deprives the Globe Equity No. 59 Decree of *res judicata* effect. Despite the narrowness of this issue, the Apache Tribe devotes much of its Statement of the Case and its Petition to describing the relatively poor current economic conditions of the Apache Tribe, understating the Tribe's water resources, and criticizing the state court adjudication process in Arizona. These contentions, introduced in the Tribe's Statement of Facts and found throughout Apache Tribe's Petition, are unfounded, misleading, and not relevant to the issue presented.

A. The Globe Equity Decree and the Apache Tribe's Water Resources.

The Apache Tribe mischaracterizes the nature of its water rights under the Decree that was given preclusive effect by the Arizona Supreme Court.[1] The Decree is based on litigation that

1. The decree (hereinafter the "Decree") entered by the United States District Court for the District of Arizona in 1935, decrees 6000 acre-feet of water to the United States on behalf of the Apache Tribe. In (Cont'd)

began in 1925. The claims of the United States on behalf of the Apache Tribe (and others) were initially stated in the Amended Complaint, dated December 5, 1927. In that complaint, on behalf of the Apache Tribe, the United States alleged federal reserved rights, aboriginal rights, and prior appropriation rights. *See In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 76-77, 127 P.3d at 894-95; Petitioner's App. A at 26a-31a; Appendix to the Phelps Dodge Corporation's Conditional Cross-Petition for Writ of Certiorari, p. 56, ¶ 7 (aboriginal rights), pp. 58-60, ¶ 9 (aboriginal and reserved rights), and p. 60, ¶ 7 (prior appropriation rights). The United States eventually negotiated a settlement, now embodied in the Decree, whereby the United States, on behalf of the Apache Tribe, was decreed the rights to 6000 acre-feet of water from the mainstem of the Gila River with a priority right senior to all other rights, except those of the United States on behalf of the Gila River Indian Reservation.[2] *See* Decree (the "Decree")

(Cont'd)
this Brief, for purposes of simplicity, the water rights, while belonging to the United States, are often described as the Apache Tribe's rights without repeating that title is held by the United States.

2. The Tribe's description of the rights of the United States on behalf of the Gila River Indian Community and the San Carlos Project is misleading because the description makes it appear as if the rights under various priorities are all cumulative. *See* Petition at 7 n.11. In fact, many rights with a particular priority are subsumed in rights with another priority. *See* Decree 105, Petitioner's Supp. App. at 217

> That certain of the foregoing rights, as listed under items (1), (3) and (4) above are inclusive one of the other so that diversions thereunder do not accumulate, and the amounts in acre feet per season and cubic feet per second stated in the 3rd item include those given in the 1st and those stated in the 4th item include those given in the

(Cont'd)

entered in *United States v. Gila Valley Irrigation District*, Globe Equity 59, June 29, 1935, at 14, 86; Supplemental Appendix to Petitioner's Petition for Certiorari, at 126,198 (hereinafter "Petitioner's Supp. App.__").

The Decree was intended to be a final and complete determination of all the parties' rights, forever barring them from claiming additional rights. *See* Decree at 6, 113; Petitioner's Supp. App. at 118 ("[T]he plaintiff and the parties defendant . . . have concluded and settled all issues in this cause as between plaintiff and said parties defendant"). The Decree enjoins the parties, their successors, and assigns from claiming any additional rights to the Gila River.

> [E]ach and all of the parties to whom rights to water are decreed in this cause . . . their assigns and successors . . . and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming . . . any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree. *Id.* at 113, Petitioner's Supp. App. at 225.

Nevertheless, in the general adjudication below,[3] the Apache Tribe and the United States on behalf of the Tribe claimed

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> 1st and 3rd; in each instance representing the total diversion allowable under that priority and those prior thereto as described in said items.

3. The state court case below is entitled the *In re all Rights to Use Water In the Gila River System and Source*, Maricopa County Superior Court Cause Nos. W1, W-2, W-3, and W-4 (Consolidated) (hereinafter the "General Adjudication")

additional rights to the Gila River far beyond those provided by the Decree. *See* Petitioner's Supp. App. 42-102.

The Apache Tribe claims that the Decree limits its water usage to irrigation and that the members of the Tribe are not permitted to allow their livestock to drink the water or even to drink the water themselves. *See* Petition, at 7 n.11, & 14-15, 26. Ironically, it was the Tribe that, over the objections of other parties to the Decree, convinced the federal District Court to rule that the Decree initially limits use of water to irrigation. *See United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444, 1476-77 (D. Ariz. 1996) ("The government and the Apache Tribe argue that Article XI of the Decree limits the use of the Gila River water to irrigating 'crops of value' *** The Court concludes, therefore, that the Decree was intended to establish an order of priorities for water that would be devoted primarily to agriculture"). More important, however, the Tribe's argument is misleading. While the initial use of water permitted by the Decree is irrigation, the Decree also provides that any party may change the use and the District Court has established detailed procedures for changing the use. *Id.* at 1476-77

> Not all such uses would necessarily violate the Decree. . . . [the] parties may change the purpose of the use of decree waters, 'so far as they may do so without injury to the rights of other parties.' . . . To the extent that a change in use reduces a user's water requirement, the Commissioner must ensure that the diversion is appropriately limited;

Memorandum and Order, dated September 30, 1993, at 16-18, Upper Valley Irrigation Districts' Appendix C at 32a-41a (hereinafter "UVID App.___"). (Providing procedures for changing a use of water under the Decree).

The Tribe also argues that the Decree left it with water resources that are woefully inadequate for the needs of its reservation. *See* Petition at 3, 9 n.15, 14-15, 22, 26. That claim is also misleading. The Tribe is not limited to using water from the mainstem of the Gila River. The San Carlos Apache Tribe Water Rights Settlement Act of 1992 confirmed the Tribe's rights to 71,445 acre-feet of surface water per year from the Salt and Black Rivers for use on its reservation.[4] In addition, the Arizona Supreme Court held that Indian tribes have a reserved right to groundwater for use on Indian reservations. *See In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 195 Ariz. 411, 418-19, 989 P.2d 739, 746-47 (1999). The amount of groundwater available to the Tribe on its reservation has not been quantified, but it is undoubtedly substantial. Finally, the decision by the Arizona Supreme Court did not preclude the Tribe's claims to the tributaries to the Gila River. Just two of those tributaries produce an average runoff that exceeds 52,000 acre-feet per year, some of which the Tribe is already using.[5] While the decision below did preclude the

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4. Pub. L. No. 102-575, §§ 3701 *et seq.*, 106 Stat. 4600, 4740.

5. *See* USGS, *Water Resources Data Arizona Water Year 2005*, UVID Appendix D at 50a. The San Carlos River produces an average runoff of 43,200 acre-feet per year; Bonita Creek produces 8,810 acre-feet per year. The Apache Tribe is already taking advantage of the San Carlos River, having dammed the San Carlos and Blue rivers to create Talkalai Lake with a surface area of approximately 600 acres, which the Tribe uses for fishing and recreational purposes. *See San Carlos Apache Tribe, Recreation & Wildlife Dept. (Fishing), http://www.sancarlosrecreationandwildlife.com/fishing.html.* Similarly, while the Tribe claims it is not permitted to use the water in the San Carlos Reservoir (Petition at 3), it nevertheless uses that water for fishing and recreational purposes. *Id.* Data for other tributaries is not readily available.

Tribe from making additional claims to the mainstem of the Gila River, the Tribe grossly overstates the decision's impact on its overall water supplies.

B. The Apache Tribe's poverty.

The Apache Tribe also argues that it is poor. The Tribe argues that no boundary marker is necessary to show where the reservation begins because there is obvious prosperity on one side of the boundary line and "stunning" poverty and despair on the Apache side. *See* Petition at 3-4. The Tribe does not cite to any evidence that would establish an immediate and abrupt contrast in prosperity at the boundary of its reservation. Nor does the Tribe offer any evidence that its poverty is attributable to the *res judicata* effect of the Globe Equity Decree. Moreover, if the farmlands on the Apache side of the Reservation boundary are in fact impoverished, the Globe Equity Decree offers a solution. The Decree authorizes the United States to acquire farmland for the Tribe "within the valley of the Gila River above the eastern boundary of said Reservation." *Id.* at 86, Petitioner's Supp. App. at 198.

REASONS FOR DENYING THE PETITION

A. Introduction.

The decision by the Arizona Supreme Court is a narrow one. In the state trial court, the Upper Valley Irrigation Districts and other parties successfully argued that the Decree, entered in 1935 by the United States District Court for the District of Arizona, has preclusive effect on the Apache Tribe's claims to the mainstem of the Gila River. On appeal to the Arizona Supreme Court, the Apache Tribe

argued, among other things, that the Decree should not have preclusive effect because the United States had not adequately represented the Tribe in the United States District Court. The Arizona Supreme Court rejected the argument on grounds of comity, ruling that the Tribe should have raised its inadequate representation arguments in the District Court when it successfully intervened in 1990 to represent its own interests in the Globe Equity litigation. *See* Pet. App. at 46a-47a; *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 73, 127 P.3d at 901.

The Apache Tribe requests that this Court grant certiorari and reverse the decision of the Arizona Supreme Court, but the Tribe does not persuasively advance any of the usual reasons for granting certiorari. *See* United States Supreme Court Rule 10. There is no allegation that there is a conflict between the decision of the Arizona Supreme Court and the decision of a court of last resort of another state or decision of a United States Court of Appeals. While the Tribe does argue that the decision of the Arizona Supreme Court is inconsistent with decisions of this Court, the Tribe's argument falls short of establishing that the Arizona Supreme Court's decision directly conflicts with any decision of this Court. At best, the Tribe is arguing that the Arizona Supreme Court misapplied decisions of this Court in a way that uniquely disadvantages the Apache Tribe, without any readily apparent impact on other potential litigants.

Even the ultimate impact on the Apache Tribe is not clear. The Apache Tribe is arguing a procedural error: that the Arizona Supreme Court is requiring the Apache Tribe to make arguments in federal court when it would prefer to have those arguments considered in state court. It is doubtful, however,

that the Apache Tribe would prevail regardless of the forum where its arguments are heard. The Tribe relies on the Restatement (Second) Judgments § 42(1)(e) for the proposition that the alleged inadequate representation by the United States is a defense to *res judicata*. *See* Petition at 8, 11, 23. But the United States is not the same as an ordinary private fiduciary. In a similar context, this Court refused to follow other provisions of the Restatement applicable to private trustees when determining whether a consent decree had preclusive effect on an Indian tribe. *See Nevada v. United States*, 463 U.S. 110, 140-41 (1983):

> The Court of Appeals . . . analogiz[ed] the Government's position to that of a trustee under the traditional law of trusts. But as we have indicated previously, we do not believe that this analogy from the world of private law may be bodily transposed to the present situation. The Court of Appeals went on to conclude: 'By representing the Tribe and the Project against the Orr Ditch defendants, the government compromised its duty of undivided loyalty to the Tribe. *See* Restatement (Second) of Trusts, supra, § 170 . . . As we previously intimated, we think the Court of Appeals' reasoning here runs aground because the Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute. Our cases make this plain in numerous areas of the law.

Moreover this Court has expressed a strong reluctance to overturn court decisions involving Indian tribes based on claims of inadequate representation, reasoning that the tribes'

remedies should be against the United States for breach of fiduciary duty. *See Arizona v. California*, 460 U.S. 605, 627-28 & n.20 (1983);[6] *Nevada v. United States*, 463 U.S. 110, 135 & n.14, p. 144 n.16 (1983);[7] *Nevada v. United States*, 463 U.S. at 145 (Brennan, Justice, concurring).[8]

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6. As a fiduciary, the United States had full authority to bring the Winters rights claims for the Indians and bind them in the litigation. . . . We find no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the government's interest in securing water rights for other federal property, or otherwise. *** [T]he other cases relied upon by the dissent, involve suits brought in the Court of Claims by Indian Tribes seeking compensation from the United States for alleged takings of Indian lands. . . . If these cases are at all relevant, it is to suggest that in an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims.

460 U.S. at 627-28 & n.20.

7. We also hold that the Tribe, whose interests were represented in Orr Ditch by the United States, can be bound by the Orr Ditch Decree. . . . We, of course, do not pass judgment on the quality of representation that the Tribe received. *** If, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.

463 U.S. at 135 & n.14, p. 144 n.16.

8. If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it. I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for

(Cont'd)

Finally, the Apache Tribe's argument rests on the untested supposition that if the attorneys for the United States had litigated, the Tribe would have received a better result than the 1935 Decree. The supposition is speculative. At least until this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), the extent and measure of reserved rights had not yet been fully developed and litigants and courts struggled with quantification issues. *See* Charles J. Meyers, *The Colorado River*, 17. Stan. L. Rev. 1, 70 (1966) ("With no guidance on the measurement of Indian rights from the Supreme Court, the lower federal courts have been struggling with the problem of quantification since *Winters*."); *Fort Mohave Tribe v. United States*, 32 Fed.Cl. 29, 35 (1994).[9]

(Cont'd)

> the breach of duty that the United States has admitted. In the final analysis, our decision today is that thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in a judicial decree, despite strong claims on the part of the Pyramid Lake Paiutes. . . [T]he law can and should fix responsibility for loss and destruction that should have been avoided, and it can and should require that those whose rights are appropriated for the benefit of others receive appropriate compensation.

9. When evaluating plaintiffs' claim of breach of trust, however, it is crucial to evaluate the government's actions at the time the actions were taken rather than with the benefit of the crisp vision of hindsight. When the United States was litigating *Arizona I*, not only did it lack precedent in which experts applied PIA standards, but it also lacked the benefit of an established PIA standard. As described above, *Winters* merely granted Indian tribes water rights sufficient to carry out the purposes for which their reservations were created and did not explain how to translate that standard into a specific quantity of water rights.

It may not be proper to fault attorneys working in the late 1920s and early 1930s for betting on the security of a settlement instead of risking the decision by a judge in what was still a developing area of the law.

Regardless of the merits of the underlying argument, however, the Arizona Supreme Court was correct when it ruled that issues concerning inadequate representation should be raised by direct attack in the District Court that entered the Decree, not by a collateral attack in state court. The decision of the Arizona Supreme Court is particularly compelling when applied to this Decree. The underlying litigation was "instituted at the suggestion of the Secretary of the Interior and by direction and authority of the Attorney General." *See* Amended Complaint, Appendix 48 to the Phelps Dodge Corporation's Conditional Cross-Petition for Writ of Certiorari, ¶ 3. The stipulation for entry of Decree was signed by Secretary of Interior Harold L. Ickes and Attorney General Homer Cummings. *See* Stipulation ("UVID App. A at 1a"). The District Court Judge, before signing the Decree, was required to decide that it was fair and reasonable and did not violate the Constitution or undermine the rightful interests of third parties. *See Stovall v. City of Cocoa, Fla.* 117 F.3d 1238, 1242 (11th Cir. 1997) ("The district court could have — indeed, should have — rejected the consent decree if it determined the decree was unreasonable, unfair, or, as the City alleges, unconstitutional"); *Kasper v. Board of Election Com'rs of the City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987) (similar); *United States v. City of Miami, Florida*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (similar).[10]

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10. *See also* 1B *Moore's Federal Practice* 0.409(5), at 1030 (2d ed. 1980) ("[T]he judgment is not an inter partes contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication.")

Accordingly, a decision that the Decree should be overturned based on inadequate representation will also require a determination that the United States District Court judge, the Secretary of Interior, and the Attorney General all did not do their jobs.[11] If decisions of a District Court Judge, the Secretary of Interior, and the Attorney General regarding the entry of a decree should be subject to later judicial review, certainly it is appropriate for the courts to require that the review be initially sought in the United States District Court where the decree was entered. As the Arizona Supreme Court pointed out, the Apache Tribe elected not to seek that review in District Court, but instead

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11. Both the Attorney General and the Secretary of Interior, as members of the executive branch, are entitled to deference based on comity. *See Calderon v. Thompson*, 523 U.S. 538, 551 (1998) ("Comity is not limited to the judicial branch of a state government. . . . the Court of Appeals should have considered as well the more vital interests of California's executive branch."); *cf.* F. Cohen, *Handbook of Federal Indian Law* (1988), § 8 p. 101 ("The acts of the Secretary of Interior with respect to Indian affairs are "presumed to be the acts of the President."); *Heckman v. United States*, 224 U.S. 413, 444-445 (1912)

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents . . . nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

See also In re: The Application For Water Rights of United States, 101 P.3d 1072, 1080 (Colo. 2004) ("The scope of the waiver of sovereign immunity under the McCarran Amendment is not so broad that it allows state courts to evaluate or adjudicate the federal agency decision making processes leading the United States to make a particular water application in a given case.")

chose the state trial court. *See* Pet. App. at 44a-45a; *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 73, 127 P.3d at 900.

B. This Court's decision in Arizona v. San Carlos Apache Tribe does not require the state courts to determine the United States inadequately represented the Tribe in District Court.

The Tribe argues that the decision by the Arizona Supreme Court, requiring it to challenge the inadequacy of the representation of the Tribe in the court that entered the Decree, misapplied principles established in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). *See* Petition at 17-23. *Arizona v. San Carlos*, however, is factually distinct. In that case, the San Carlos Apache Tribe and other Indian tribes instituted new litigation in federal court to determine their respective water rights rather than permit those rights to be determined in the general adjudications that were already pending in state court pursuant to the McCarran Amendment. 463 U.S. at 557. This Court stayed the proceedings in federal court based on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), in part to further the judicial bias against "piecemeal litigation." *See* 463 U.S. at 569-71. By contrast, in this case, the District Court that entered the Globe Equity Decree had retained jurisdiction over the Decree. *See* Decree at 113, Petitioner's Supp. App. at 225. Pursuant to its continuing jurisdiction, the District Court has considered and resolved numerous disputes among the parties to the Decree.[12]

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12. *See, e.g., United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irrigation District*, 31 F.3d 1428 (9th Cir. 1994); *United States v. Gila Valley*

(Cont'd)

The Apache Tribe intervened in the District Court case to represent its own interests, but did not seek to attack the decree itself or challenge the previous adequacy of the representation of the Tribe by the United States. *See* Pet. App. at 44a-45a; *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 72, 127 P.3d at 900. After the Apache Tribe's intervention, at the request of the Tribe and other parties, the District Court has enforced numerous provisions of the Decree, resulting in five reported decisions and many other unreported decisions and orders.[13] Even when finding that a particular provision of the Decree was harsh as applied to the Apache Tribe, the District Court still enforced the Decree, holding that "the Decree was intended as a complete statement of the rights of the various parties to the waters of the Gila River." *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1, 10 (D. Ariz. 1992). Certainly, if "piecemeal litigation" is to

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(Cont'd)

Irrigation District, 961 F.2d 1432 (9th Cir. 1992); *United States v. Gila Valley Irrigation District*, 959 F.2d 242 (9th Cir. 1992) (unpublished); *United States v. Gila Valley Irrigation District*, 454 F.2d 219 (9th Cir. 1972); *Gila Valley Irrigation District v. United States*, 118 F.2d 507 (9th Cir. 1941); *Brooks v. United States*, 119 F.2d 636 (9th Cir. 1941); *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444 (D. Ariz. 1996); and *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1. (D. Ariz. 1992).

13. *See United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irrigation District*, 31 F.3d 1428 (9th Cir. 1994); *United States v. Gila Valley Irrigation District*, 961 F.2d 1432 (9th Cir. 1992); *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444 (D. Ariz. 1996); and *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1. (D. Ariz. 1992); Memorandum and Order, dated September 30, 1993, UVID Appendix at 19a.

be avoided, the Apache Tribe, after having repeatedly sought and obtained enforcement of the Decree in federal court, should not now be permitted to collaterally attack that same Decree in state court. As the Arizona Supreme Court reasoned, if the Apache Tribe wanted to challenge the validity of the Decree, it should have done so directly in the federal court that entered the Decree. *See* Fed. R. Civ. P. 60(b).

The Apache Tribe argues, however, that it does not intend to "upset or invalidate" the Globe Equity Decree. *See* Petition at 9 n.15. The argument is nonsensical. The Decree adjudicates thousands of water rights to the mainstem of the Gila River. *See* Decree 14-85, Petitioner's Supp. App. 126-197. The Apache Tribe is claiming more than 643,026 acre-feet of water from the mainstem, which is almost three times all the decreed rights for *all* the parties in Hidalgo County, New Mexico, and Graham and Greenlee Counties in Arizona and more than all the Gila River water that entered the Safford Valley during the year 2005, a very wet year. *See* Petition at 6 n.10; *compare* Decree at 14-85, Petitioner's Supp. App. 126-198.[14] If the Tribe is successful in its claim, the Decree and all the decisions obtained by the Tribe and other parties interpreting the Decree will be meaningless.

Finally, presumably attempting to show that the decision below will have impacts that extend beyond the Apache Tribe

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14. *See* the *Annual Report on the Distributions of Waters of the Gila River, by the Water Commissioner to the United States District Court for the District of Arizona* (2005), *http://www.gilawater.org/annual.pdf*, Plate 29-9 (summarizing all diversion rights under the Decree) and Plate 37 (showing flows of water in the Gila River at the head of the Safford Valley). The portion of the San Carlos Apache Reservation adjacent to the Gila River is in the Safford Valley, downstream from the gauging station at the head of the Valley and upstream from the Gila River's confluence with the San Carlos River.

and the facts of this case, the Apache Tribe argues that the Arizona Supreme Court's decision will mean that any Indian tribe, which in some prior proceeding has been represented by the United States, will be barred by principles of *res judicata* from raising claims that could have been raised in the prior proceeding. *See* Petition at 21-22. It is true that normal principles of *res judicata* bar a party and its privies from litigating claims that could have been litigated in a previous proceeding that resulted in a judgment. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 477 (1998). But this case is unique. Here, the federal court that entered the prior decree has retained jurisdiction and continues to actively administer and enforce the decree. Yet, at the same time the federal court was enforcing the decree, the state courts were addressing whether the decree should be given preclusive effect. It is highly unlikely that similar facts will be encountered again. Contrary to the Tribe's argument, even assuming the decision by the Arizona Supreme Court is wrong (which it is not), at worst, the decision was a misapplication of law to a unique set of facts, not justifying review by this Court. *See* United States Supreme Court Rule 10.[15]

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15. Only two other tribes are known to have faced somewhat similar circumstances, but neither will be litigating this issue. The Gila River Indian Community, which also has claims under the Decree, has settled its water disputes. *See Arizona Water Settlements Act of 2004*, Pub. L. No. 108-451, Titles II & III, 118 Stat. 3478, 3499, 3536. The Orr Ditch Decree, entered about the same time as this Decree, has already been found by this Court to have preclusive effect on the claims for the Pyramid Lake Indian Reservation, despite allegations that the United States had inadequately represented the interests of the Reservation. *See Nevada v. United States*, 463 U.S. at 145.

C. The decision below does not violate the due process and equal protection provisions of the fifth and fourteenth amendments to the Constitution.

The Apache Tribe argues that the decision below deprived it of its rights to due process and equal protection. *See* Petition at 23-27. The Tribe does not allege that there is any conflict between the decision of the Arizona Supreme Court and the decision of a court of last resort of another state or decision of a United States Court of Appeals and the Tribe does not allege a direct conflict with any decision of this Court. Instead, the Tribe argues that well-established general propositions of law were misapplied.

The Tribe's due process argument is that it has never had its "day in court" to argue its defense of inadequate representation to *res judicata. Id.* The Tribe does not cite to any authority, however, that due process entitles it to any particular forum. Indeed, there is nothing about the decision below that would prevent the Tribe from making a direct attack on the Decree. *See Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1135-36 (9th Cir. 2001); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000); *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985). It may be that the District Court, after having heard and decided numerous arguments of the Tribe regarding the enforcement of the Decree, might hold that the Tribe has waived any right to now upset the Decree. Such a ruling, however, would not be based on the decision of the Arizona Supreme Court below; instead it would be based on the Apache Tribe's decision to

intervene in the federal litigation without making a direct attack upon the Decree.[16]

The Tribe's equal protection argument is based on two claims. First, the Tribe claims that the trial court improperly invited non-Indian parties to assert that the Decree had preclusive effect on the Apache Tribe "with no risk to their own claims." *See* Petition at 29-30. The Apache Tribe is wrong. At the same time that the trial court heard motions for summary judgment regarding the preclusive effect of the Decree on the Apache Tribe, it also heard similar motions regarding its preclusive effect on the Gila Valley Irrigation District and the Franklin Irrigation District. *See* Order dated April 4, 2002, UVID App. B at 17a-18a. The court found that the Decree had preclusive effect on the Irrigation Districts, as well as on the Apache Tribe. *See* Order dated May 17, 2002, Pet. App. at 64a-65a.

Second, the Tribe claims that non-Indian farmers, towns, and private companies, unlike the Tribe, are free to make additional claims to the Gila River for lands not covered by the Decree. *See* Petition at 26-27. Since the Tribe does not cite to any fact or authority in support of this claim, it should be ignored. Moreover, the decision of the state trial court that barred the Apache Tribe from making additional claims to the Gila River also barred the Upper Valley Irrigation Districts from making additional claims to the River. *See* Orders dated April 4, 2002, UVID App. B, and May 17, 2002, Pet. App. at 64a-65a. Contrary

16. Even if the Tribe has waived its rights to directly attack the Decree, it still may have a remedy for inadequate representation. *See Arizona v. California*, 460 U.S. at 627-28 n.20 ("[I]n an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims."); *Nevada v. United States*, 463 U.S. at 144 n.16 ("If, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.")

to the suggestion by the Tribe, the *res judicata* decision by the trial court was not based on the ethnicity of the claimants, instead the Court ruled that parties whose rights had been adjudicated by the Globe Equity Decree were precluded regardless of whether they were non-Indian members of the Upper Valley Irrigation Districts or were Indian tribes represented by the United States. If other persons and entities, not precluded by the Globe Equity Decree, are making additional demands on the Gila River, the Apache Tribe, like any other party, may challenge those demands in the General Adjudication.

Finally, the Apache Tribe argues that the General Adjudication in Arizona has been a failure, has taken too long, and suggests that the Tribe has not been treated fairly in the Adjudication, perhaps implicating constitutional requirements of due process and equal protection. *See* Petition at 6, 16, 18 & n.28, 21, 26, 27, 30. In support of its argument, the Tribe cites to allegedly prejudicial state legislation that was passed while the General Adjudication was proceeding in the state courts. *See* Petition at 27-30. After the legislation was passed, however, the Apache Tribe challenged the legislation and both the state trial court and the Arizona Supreme Court, on interlocutory appeal, ruled that most of the legislation was unconstitutional. *See San Carlos Apache Tribe, et al. v. Superior Court of Arizona*, 193 Ariz. 195, 972 P.2d 179 (1999). The decision in *San Carlos Apache Tribe* is just one of various interlocutory appeals in the General Adjudication where the Arizona Supreme Court has ruled in favor of the Apache Tribe and other federal parties. *See In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (Accepting the Apache Tribe's and other Indian tribes' arguments that the tribes' reserved water rights are not limited by the PIA standard); *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 198 Ariz. 330, 9

P.3d 1069 (2000) (Broadly interpreting the meaning of "subflow" as argued by the Apache Tribe and other federal parties); *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 195 Ariz. 411, 418-19, 989 P.2d 739, 746-47 (1999). (Ruling that Indian tribes have a reserved right to groundwater). Contrary to the Tribe's argument, and the Tribe's one loss (in the decision below) and its many victories (in earlier decisions) do not demonstrate that the General Adjudication in Arizona has been less than adequate to protect the rights of Indian tribes, including those of the Apache Tribe.[17]

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17. The Tribe's criticism of the General Adjudication also ignores the 1992 settlement of some of its own claims and the significant benefits other Arizona Indian tribes have received by settlement. *See, e.g.*, Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549; Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, Title IV, 104 Stat. 4469, 4480; Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, Titles II & III, 118 Stat. 3478, 3499, 3536 (regarding both the Gila River Indian Community and the Tohono O'odam Nation). The Tribe argues that the trial court in the General Adjudication has improperly chosen to adjudicate Indian water claims before other water claims. *See* Petition at 27 n. 34. The Indian water claims are very large and many have priority claims that are senior to most, if not all, private water rights. Surely, there are non-discriminatory administrative explanations for the trial court's choice to litigate Indian water claims first. Moreover, the initial focus on Indian water rights may have resulted in at least some of the settlements of Indian water rights claims. The Tribe is correct, however, when it argues that the General Adjudication has taken longer than some persons anticipated. Undoubtedly, a large portion of the delay is attributable to both the settlements and the numerous interlocutory appeals.

CONCLUSION

The decision by the Arizona Supreme Court was correct. But even if it were wrongly decided, there is no allegation that there is a conflict between the decision of the Arizona Supreme Court and the decision of a court of last resort of another state or decision of a United States Court of Appeals. Nor does the Tribe show that the decision of the Arizona Supreme Court directly conflicts with decisions of this Court. At most, the Apache Tribe argues that the Arizona Supreme Court misapplied well-established principles of law. The Upper Valley Irrigation Districts request that the Apache Tribe's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents
Gila Valley Irrigation District
and Franklin Irrigation District

APPENDIX

APPENDIX A — STIPULATION FOR AND CONSENT TO THE ENTRY OF A FINAL DECREE FILED JUNE 29, 1935

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE CASE OF
UNITED STATES OF AMERICA V. GILA VALLEY
IRRIGATION DISTRICT, ET AL.

Come now the parties hereto, either in person or by their solicitors, and inform the Court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the Court to adopt said decree as its finding herein and that it be entered as its final decree in this cause, settling and adjudicating the rights of the parties hereto.

For the United States of America

HOMER CUMMINGS,

The Attorney General

HAROLD L. ICKES,

The Secretary of the Interior

CLIFTON MATHEWS, F. E. FLYNN,

Clifton Mathews, Esq. June 24, 1935

United States Attorney,

Solicitors for the plaintiff, April 11, 1935

Appendix A

GERTRUDE M. CONVERSE,

Gertrude M. Converse, Solicitor for the San Carlos Irrigation and Drainage District, defendant heretofore ranged in interest, on the side of the plaintiff, and for the following other defendants:

Archie L. Bartlett; Fred W. Bassler; Maude M. Bassler; George W. Burgess; Louis Cathemer; Hazel A. Converse; Eldora Curry; Roland Curry; Salvadore S. Feliz; Juan S. Feliz; Manuel S. Feliz; Pedro S. Feliz; J. J. Fraser; F. P. Jamieson; J. C. Jamieson; W. O. Kidder; Edith Knappenberger; Frank Knappenberger; Ed Lacy; Elizabeth M. Martin; Rolland H. Moorehouse; L. S. Nafziger; M. N. Nafziger; Leon M. Nowell; George W. Smith; C. H. Southworth; Dugald Stewart; James R. Treat; Louise M. Trekell; and Don A. Trekell

KIBBEY. BENNETT, GUST, SMITH AND ROSENFELD

by J. L. GM, Kibbey, Bennett, Gust, Smith and Rosenfeld, Solicitors for the following defendants:

D. S. Adams; D. T. Adams; L. A. Adams; Joseph Alder; H. L. Alexander; Ephrian J, Allen; J. A. Allen; Johs W. Allen; Lewis Allen; S. E. Allen: A. A. Allred; Dells Allred; Edith H. Allred; Elden Allred; E, M, Alfred: J. N. Allred; Mrm. Bande Allred; Myron J. Allred; Phoebe Allred; Ruth Allred; Sesario Alvillar; H. J. Anderson; Tom Armada; Fannie Bailey; Mrs. V. M. Baker; M. B. Baker; George P. Ballard; Felix Bareda: Pablo Barela; Mrs. Sarah Barney; Ore. Sophia

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Barney: W. T. Barnet'; E. D. Sarry; Innocents Bartolda; Savers Bartolda; Thomas Bntty; Walter Batty; C. M. Deal: J. H. Beal; Mrs. J. S. Deals: William N. Bombs; Frank V. Beers, Admin¬istrator of the Estate of R. H. Seers. deceased; Thomas H. Doll; W. A. Bennett; William Bigler: John Bilby; John Billingsley; Hyrax Bingham; J. H. Bingham; Lester Bingham: R. William Bingham, Warren Bingham; W. R. Bingham; D. W. Birdoo; Mrs. Jobs J. Birdno; Mary Lorraine Birdno; E. W. Black: Edsil Blain; W. M. Blair: Ben Blake; Rd Blake; 1. B. Blake; Mrs. Thomas Blake; T. F. Boggs; W, P. Bollinger; Charles Boots; C. B. Borenl William Boron; H. G. Boyle; Mrs. Artis Branam; L. B. Brava*; Wallace Branch; Brown Canal Company; Crate D. Brown; Jaared T. Brown; L. J. Brown. Jr.; William Brunson; Adelaide M. Bryce: A. J. Bryce; David J. Bryce; E. P. Bryce; C. A. Bryce; Haber B. Bryce; J. W. Bryce; R, A. Bryce; Mrs. Sarah Bryce: W. C. Bryce; William S. Bryce; E. 0. Bullard; Charles Burrell; George Burrell; Manuel Burrell; T. D. Burton; J: D. Busby; Mary Butler; W. F. Butler. Jr.; Edward Carpenter; Frank Carpenter; John Carpenter; tester Carpenter; William Carpenter; Mrs. ions Carrasco; V. Carrasco Antone Carrson; Albert Carter; Alof P. Carter, Administrator of the Estate of E. L. Carter, Deceased; W. A. Carter. Sr., Ethel B. Carter; W. R. Chambers; J. A. Chapman, W. W. Chapman; Pablo Chavarria; P. Chendilla; D. W. Cheney; lira. A. W. Chesley; J. B. Chemter-. H. R. Chiarson; Antone Christensen, Victor Christenson; Citizens Bank; Edward M. Claridge; Charles S. Clark; H. J. Clark; W. A. Clark; H. S. Clarke; Aeshel Clifford; Elijah Cliffnrd; Henry Clifford, Sr.; L. A. Clifford; W. H. Clifford; B. F. Cleft; Benjamin R. Cliff, Administrator of the Estate of Joseph Cluff, deceassd; Mrs. J. E. Cluf!; John Cluff; Evans Coleman; H. L. Colvin, John D. Colvin:

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Colvin-Jones Canal Company; C. S. Conway; C. S. Conway. Administrator of the Estate of F. W. Haym, deceased; C. L. Coombs; George Coombs, N. V. Coombs; lasso Combs; N. E. Combm; Willies Coombs: Grady Copped=.; James Corder, John C. Cnpper; Henry Crabbe; Mrs. W. R. Craig: 0.•R. Crandall; R. D. Crandall; 0. L. Crawford, H. W. Crockett, W. W. Crockett; A. J. Curtis; Ammon Curtis; Curtis Canal Company: Claws Curtis; Don Curtis; Mrs. Elizabeth Curtis; Leery Adelbert Curtis; Eugene Curtis; Ezra Curtis; Ore. Frank Curtis; H. M: Curtis; Mrs. Virginia Curtis; L. C. Cutler; Charles E. Dallas; Mrs. Julia Daly; Willis R. May; Mrs. Hester Damron: Johs ft. Davidson. A. B. Docker; Z. B. Decker; Etta 0. Deller: Mrs. Honry Dial; Guy Dixon, A. J. Dodge; Dodge-Nevada Canal "any; David Dodge; Mrs. Layman Dodge; Thomas Dodge; J. M. Dominges; Ciaro Domingues: Mrs. Lily Duke; J. W. Earvin; Banjul* Echolm; Ramcido Elias; H. B. Elledge; Davidsel Ellsworth, Ernest Ellsworth. Premix Ellsworth; William Ellsworth: Mrs. Gharlotte F. Elmer; J. H. Elmer; Mrs.Sarah S. floor; Hart D. Empie; Miguel Encinas; Catalina Entzsinger; Mrs. Belle Epley; John C. Epley; P. tatrads; Austin Evans; George C. Evans, E. C. Eyring; Amadeo Fajardo; C. E. Farley; J: A. Farley; Luther Farley; A. M. Farmer; F. A. Farrell;, C. J. Farrington: J. W. Felshaw; M. P. Ferguson; F. M. Farrell; C. E. Ferrin; Ether S. Ferrin; Robert Ferrin; W. M. Ferrin; Jose Figuerroa; J. H. Fine; Seth P. Fletcher; Elias Fieree: More. Floyd; Joseph E. Follett; 1. A. Follett; L. L. Follett; W. L. Follett, George Toote; Orson F. Foote; W. R. Foote: Fort Thomas Consolidated Canal Company; Hugh Foster; John H. Fuster; J. A. Foster; Karl Foster; Fourness Canal Company; Mrs. Clara Poorness; J. L. Foutz; Augustin Franco; Pedro France: J. L. Freeman; M. S. Freeman; Alas Freestone;

Appendix A

Charles E. Freestone; R. L. Freestone; P. H. Freudenthal; Archie Fuller; Lawrence Fuller; Thomas F. Fuller; William Fuller: Millard Fyffs; E. Gallego; Casimiro Garcia; 0. Garcia; Jeeus Carcis; Jose B. Garcia; Juan Caroia; Marajilda Caroia; Rafael Garcia: Tomas Garoia; Victoriano Garoia; Thomas Gardner. Ramon Causa; Fernando Cervantez; Charles Gietz; Gila Valley Irrigaticn District; Albert Gillespie; Edward L. Gillespie; Jaws Gillespie: Shell Gillespie; William H. Gillespie; Forrest Gilliland; J. R. Gillmore; J. R. Goldlng; Mrs. S. 0, Gonzales: Mrs. Francis Goodman; George A. Gourley; Graham Canal Company; Mattie Graham; Epitacio Granillo; J. L. green Reece b. Green; J. W. Greenhalgh; R. H. Greenhalgh; Christine Grijalva; J. M. Grijalva; Merejildo Grijalva; C. J. Grover; Hugh C. Hammen; E. E. Hancock; Ira Hancock; Jesse A. Hancock; H. B. Hares; A. Harper; John H. Harper; Delbert Hatch: George L. Hatch; 0. J. Hatch: Elijah Hawkins; J. N. Hawkins; C. D. Haynie; L. B. Head; George R. Healy; C. M. Hendricks: Sam Henry; Spence C. Heywood; John Nicks; C. H. Higgins; Heber M. Higgins; Mrs. Clara Hinton, Calvin Hooker; F. H. Holiday; Soott Holladay; S. N. Holman; J. N. Holyoak; William H. Holyoak; Mrs. Arthusa Hoope.; Bert Hoopes; H. E. Hoop..; John L. Hoopes; George A. Hoops: C. D. Householder; E. D. Howard; J. M. Howard; Joseph Howard; S. D. Howard; Almera Hubbard; Thomas H. Hundley. A. G. Hunt; Sarah A. Hunt; Mrs. S. J. Hunter; Mrs. W. E. Irwin; George P. Jacobson; Martin Jacobson. P. J. Jacobson; S. L. Jenkins; S. P. Jenkins; James Jensen; David Johns; Charles P. Johns; D. L. Johns; J. C. Johnm; L. A. Johnm; W. A. Johns; Mrm. William Johns; D. C. Johnson: Norman J. Johnson; P. Johnson; Orlando Jolly; James E. Jones; David Jurado; Leo Keiffer; P. M. Kelly; A. J. Kempton; Asa B. Kempton; Bell Kempton,

Appendix A

Administratrix of the Estate of A. N. Bryce, deceased; Calvin I. Kempton; Fred Kempton; Heber Kempton;. Ire N. Kempton; Mrs. Margaret R. Kempton; R. H. Kempton; Donald Kennedy; J. D. Kennison; C[illegible]rles Kerby; George Killian; Heber C. Kimball: Spencer Kimball; Thomas S. Kimball; F. E. Kirkpatrick; Charles Kruger. Cora Kruger; E. M. Lambson; A, 0. Lamoreaux; Guy W. Lamoreaux; R. D. Lamoreaux; Beatrice Larson; Charles S. Larson; 0. 0. Larson; Eral Larson; Ephriam Larson; James M. Larson; Joe Larson; Lehi Larson, Sr., Maroni Larson. Mildred B. Lamn; Mrs. Olives Larson; Orvil Larson-. William Larson; Alex Layton: Charles M, Layton; 0. M. Layton, Jr.; H. W. Layton: Leslie W. Layton; M. Y. Layton; Oscar 0. Layton: R. G. Layton, Jr.; Roy A. Layton; Any T. Leavitt, Claude M. Lee: J. D. Lee; J. Y. Lee; Marion Lee; Mrs. W. A. Lewis; Mrs. Nisia Lindsay, Al Lines; Joseph H. Liars; Milton Lines; W. A. Lines; Charles Luster: R. L. McAllister; D. C. McBride: Ether McBride; James A. McBride; Laura McBride; P. H. McBride; P. H. McBride, Jr.; W. E. McBride; Mrs. Laura MaCullom; C. J. McElroy: Martha McElroy; A. F. McEuen. E. W. McEuen; M. P. McEuen; Virgil R. McEuen, Thomas McGuire; A. 0. Mack; 0. M. Mack; Henry H, Mack; J. A. Mack; J. H. Mack; William S. Mack; Robert Mackay. Abran Madrid; James Mallon, W. J. Mallon; Angus Malay; 0. B, Malay; M. D. Malay. Clark Mangum, S. Marcus; S. S. Marshall; W. 0. Marshall; Clarence Martin; J. B. Martin; J. S. Martin; Mrs. W. F, Martin; Juan Martinez, C. V. Massey, J. T. Massey: Mrs. L. A. Massey; George A. Mathews. Simon Mathews; G. A. Matthews; Mrs. Chloe Matthews: D. H. Matthew.; Eliza Matthews. Jane L. Mattice; John W. Mattice; Lewis P. Mattice; BenMauer; Kimball Urban, Mrs. T. M. Medhurmt; Miguel Mean. Manual Mender; Damasio 0. Meraz; Gerald

Appendix A

Merrill; H. M. Merrill; Martha A. Merrill; P. C. Merrill; P, 0, Merrill. Administrator at the Estate of Joe Pensyl. deceased; P. M, Merrill; $. A, Merrill; Wiles Messinger. Louis Michelena; Mrs. M. Michelena; Mrs. J. S. Miles; G. R. Miller; Sisto Molino; Francisco Master; Jesus Montez; Montezuma Canal Company; E. E. Montierth; George Montierth; Leslie Montierth; M. 0. Montierth; Wendell Montierth; Edward Moody: Edwin Moody; J. M. Moody; Winford Moody; J. R. Moore; Jose Morales; Mrs. Belle Morris; Cicero Morris; E. M. Morris; Frank Morris; George Albert Morris; John W. Morris; Robert Morris; Williaw Morris; M. Mortensen; C. N. Motes; D. T. Motes; Ernest Votes; P. L. Motes; Anna N. Votas; Joseph Motes; J. R. Naillon; Aran T. Nelson; L, A. Nelson; W. L. Nelson; H. L. Norton, Jr.; H. L. Morton, Sr.; J. E. Norton; P: A. Norton; S. N. Norton; William R. Norton; John Multon; J. H. Nuttall: Braulio Ochoba: Elam Olsen; Victorino Olivas; W. Ollerton; Oscar Olson; H. Ortiz; Claim L. Overly: J. 'T. Ovens, Jr., 0. 8. Owens; Mrs. C. R. Pace; Mrs. Isabelle Pace; W. W. Pace; Asa Packer; X, X. Packer: Joaquin Padilla; Mrs. Marcelina Padilla; C. Palmer; I. J. Palmer: lasso 0. Palmer; J. I. Palmer; Lee L. Palmer: Mrs. Nancy Palmer; Ray Palmer; Van D. Palmer; George 0. Peok: William A. Peck; Callate B. Pool; Mabel Perkins: Juvenal Perolas. Administrator of the Estate, of Damas Do Leon, deceased; Maranda Perkins, Jacob Peters; Alms Peterson; P. 0. Peterson; Wilfred Peterson; E. C. Phillips; Jesse 0. Phillips; Rodger Phillips: W. A. Pitt; Den T. Platt; W. E. Platt; E. M. Plumb; Henry E. Plumh; J. M. Plumb; S. V. Pollack; A. T. Pollock; James H. Porter; 3. V. Porter; W. A. Posy; W. A. Posy, Administrator of the Estate of Orson Ellictt,. deceased; D. T. Preston; M. F. Premton; W. P. Preston, W. J. Preston; Harriett Pulsipher: J. E. Pulsipher; Jesse B. Quinn; Anastacio

Appendix A

Quiroz; D. Raper; B. 0. Rapier; Miles Roay; Robert 8. Reed; Sarah C. Read; Mrs. W. R. Rood: T. J. Rex; Carlysle Reynolds; S. Z, Reynolds; J. F. Rhinehart; W. 0. Richards, George F. Richards; Gilbert Richardson. Rebecca Richardson; Sarah L. Richardson: Lito Rios; W. H. Roach; I. P. Robinson; Charles Rogers; David Rogers, H. P. Rogers: Joseph Rogers, Mrs. Louisa Rogers; A. Rohner: C. N. Rose; Niels J. Roseberry; Espedion Sadilla; C. B. Sale; Ethloa Saline; John Saline, Roy Saline; R. 0. Saline; Jose Samora: Abel Sanchez; Adiel Sanchez: Daniel Sanchez; Eliseo Sanchez: P. Sanchez, Isian Sanchez: Manuel Sanchez; D. R. Sanders; George Sanders; San Jose Canal Company; Clarence Scarlett: J. W. N. Scarlett; L. B. Scarlett: W. F. Scarlett; J. E. Schurtz; S. E. 0. Sears; Andrena Serna; Santos Same; Mrs. John Shields; A. J. Shifflet; J. S. Shifflet; R. R. Shipp; Francis M. Skinner; Maroni Skinner; Mrs. Martha Skinner; A. A. Smith; Mrs. 0. E, Smith; E. 0. Smith; H. L. Smith; J. M. Smith; Joanna Smith; L. W. Smith$ M. M, Smith; R. A. Smith. Sr.. Mrs. W. R. Smith; Mrs. J. B. Smithson; Smithville Canal Company; Charles F. Solomon; J. W. Sowell; S. A. Sowell; W. H. Spafford; W. D. Spear; Mrs. C. F. Stanley; Los N. Straton, Administrator of the Estate of Mrs. N. A. Bell, deceased; Albert Stephen, H. W. Stevenson; T. J. Steward: Pratt Stewart; John Stowe; Brigham Stowell: Mathews Stuart E. P, Stuermer; W. R Summers; D. V. A. Talley; Jamem M. Talley; J. T. Talley; 7. Hugh Talley; Van Talley; X. V. B. Talley: H. M. 'ate; P. R. Taylor; John E. Taylor; L. M. Taylor; Sarah Taylor; William 0. Taylor, William H. Taylor; P. H. Temple; S. B. Tenny, Jr.; Alva Thatcher;; L. N. Thatcher;: Tidwell Canal Company; Ida Tidwell John Tidwell and E. L. Tidwell, Jr., Administrators of the Estate of . L. Tidwell. deceased; George A. Todd; John

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T. Traylor; W. 0. Tuttle; Frank H. Tyler; Oscar Tyler; William 0. Tyler, M. P. Tryon; Union Canal Company; H. 0. Usher; The Valley Bank & Trust Company; George Van Gaumig; Harry Van Order, Administrator of the Mate of Harry you Order, deceased; Antonio Vasquez; Jose Varalo; Souls Vials; Jose Villareal; W. R. Weddell; Jerome Walker; J. P. Walker; Charles Wasslas; Mrs. J. C. Pansies; Mattie Wamelee; William Pansies; Mrs. H. . Warnar; Henry A. Waters; Charles Watson; Lorenzo Watson; Fred Waughtal; Fred Webb; J. D. Webb, F. A. Webster, 0. F. Webster; William Webster, A. E. Weech; Adam Walker; Arthur Walker; C. D. Welker; J. A. Walker; R. A. Welker: Willard Walker; A. T. West; John West; B. F. Whitener, Sr.; B, F. Whitmer, Jr.: Mrs. Mildred Whitmer; Fred H. Wiener; W. W. Wild; A. A. Wilkins; Mrs. Charlotte Wilkins; Dan Williams; S. 0. Williams; lasso Williamson; T. L. Willis: J. V. Wilson; Mrs. Virgin R. Wilson; Mrs. W. A. Wilson; Alonzo Winsor; F. M. Woodward; R. A. Woolsey; Carrie B. Yett; and Dan Young; J. 0. Anglin: Pedro Bartolda; George A. Bigler; J. Bingham; Alof P. Carter; W. A. Carter, Jr.; Edgar N. Chesley; Church of Jesus Christ of Latter Day Saints; Benjamin P. Cluff, Administrator of the Estate' of Phoebe Cluff, deceased; W. D. Clef f; County of Graham, State of Arizona; Joseph Greenhalgh; Annie E. Hancock; M. M. Hancock; Zeb Ison; S. L. Johns; W. M. Kerby; A. 0. Lamoreaux, Jr.; Layton Corporation of the Church of Jesus Christ of Latter Day Saints; Art Lee; Henry Lines; George Clyde Mathews; Fred M. Mitchell; S. R. Hallion; Robert L. Mash; Lloyd Morton; Mrs. E. Olsen; Plea Corporation of the Church of Jesus Christ of Latter Day Saints; Plus Townsite; Mrs. Mattie Prina; Charles M. Pursley; George Reynolds; Mrs. Nancy Reynolds; David L. Ridgeway, Pedro Ruiz; Town of Safford; Safford School District No, 1. County

of Graham. State cf Arizona; School District No. 7, County of Graham, State of Arizona; School Dimtrict No. S. County of Graham, State of Arizona; School District No. 11. County of Graham, State of Arizona: School District No. 12. County of Graham. State of Arizona; School District No, 31, County of Graham, State of Arizona; George R. Shurtz; Townsite of Solomonville; Sunflower Canal Company: A. V. Tate, Town of Thatcher;; 0. F. Webster, Adminimtrator of the Estate of Thomas 0. Webster, deceased; Mrs. M. 0. White; Nephi Williams; Mrs. G. R. Young; and Emma B. Mellinger.

H. A. ELLIOTT, by A. R. LYNCH.
A. R. LYNCH,
H. A. Elliott and A. R. Lynch,
Solicitors for the following defendants:

J. L. Aker; Albert Canal Company; H. Albert; Mrs. Eliza Alexander; U. M. Allred; Hans Andermon; T. J. Anderson; R. H. Angle; T. W. Arnett. Albert L. Barber; E. 0. Barlow; J. R. Bearers, Florentino Billaba, Billingsley Extension canal Company; B.' F. Billingsley; Black L McCloskey Canal Company; W. Bleinstein; Silas Bradshaw; T. J. Branyon: C. M. Brooks; M. H. Brooks; R. W. Brooks; W. W. Brooks; J. H. Brown; S. A. Brown; T. W. Brown; Nellie K. Buck, Administratrix at the Estate of David Buck, deceased; J. C. Burleson; David F. Campbell, Jr.. Mary E. Campbell; J. E. Cardon; J. R. Carter; Mrs. Tom Carter; Ypolita Cosoarilla; Mrs. Maggie Cauthen; A. D. Cheatham, Betty Marsh Cheatham; E. V. Cheatham; I. M, Cheatham: Mary Ann Cheatham; S, C. Cheatham; J. K. Chilton; L. T. Christensen: R. F. Cloudt; M. A. Clouse; Jas. I. Coke; G. W. Collins; Columnar* Canal Company; Cooper Windham Canal

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Company; Cosper & Windham Extension Canal Company; Alice H. Cooper; George H. Cooper; George H. Cosper, Jr.. Administrator of the Estate of George Cooper, deceased; Mussett Cooper: J. L. Crabtree: F. Y. Craig; W. C. Craufurd; J. H. Cready; F. M. Crockett; Mrs. M. J. Daniels;; E. 0. Davidson; David Davis; E. Day; Mrs. K. A. Does, Carl M. Donaldson; Duncan Canal Company; Duncan Union High School Dimtrict, Gus Duncan; Byron Cobalt; M. B. Echols; Joseph C. Elledge; R. E. Elledge; W. H. Elledge: 0. I. Bluer; John Evans. Amos F. Fearin; J. W. Foote; S. A, Poster; W. F. Foster; J. R. Fowler; Ernesta Francese, Administratrix of the Estate of Frank Francens, deceased; Franklin Irrigation District; R. H. Friestone; J. B. Fullerton; B. J. Gale; Mrs. E. A. Gale; I. B. Gale; Otto Gale; W. T. dale; James A. Gamble; F. N. Gault, W. A. Gill; Aubra Gilliland: J. M. Gilliland; R. C. Gilliland; Emil Girard; Trivio Gonzalez; H. Grady; John Hagan; H. B. Harris; K. L. Harris; Waide Harris; G, Lynn Hatch; J. L. Henderson; C. C. Heater; 0. L. Next; Floyd Hightower; C. F. Hill: J. W. Hill; Nellie R. Hooh; C. F. Houlihan; Rachel Jensen; R. T. Johns; Delbert Johnson; G. N. Johnson; Thcmas H. Johnson; F. W. Jones; John B. Jones; Mary Jane Jones; Parley P. Jonem; T. V. Jones; Willard E. Jones; Culver Kartchner; Mrs. S. L. Kemp: Richard Kirtland, A, T. Layton; A. N. Livvix; R. W. Lloyd; Anna H. Lint; Edward Lunt; George A. Lunt: 0. V. Lunt: Heaton Lunt; Omen Lunt; P. L. Lunt; Randall Lunt, Administrator of the Estate of Jamper Gale. deceased: R. H. Lunt; R. V. McCarty. J. F. McGrath; R. J. McLaren; M. J. Mabin; William Manske; C. C. Martin; J. A. Martin; J. H. Merrian, Executor of the Estate of Alto. K. Day, deceased; E. A. Merrill, Fenley F. Merrill: Orson A. Merrill; T. S. Merrill; R. K. Miller; James A. Mitchell; Meddle Canal Company; Robert M. Montgomery;

Appendix A

Theodore H, Moody; R. C. Moore, Hans Mortensen, Hiram K. Mortensen; J. Alfred Martens"; Peter Mortensen; W. T. Mosley; L. D. Moyers; L. 0. Moyers, W. F. Moyers. H. J. Nunn. T. A. Nunn; J. P. Oberholser: 0. 0. Odell, James Opts; Nancy 0. Pace; B. 0. Packer; C. C. Passmore; E. C. ram:; H. N. Payne.; Junius E. Payne; Lemlie B. Pays*; W. U. Phillpott; C. Pirtle; Mrs. M. E. Pittman; 0. W. Quinn; Margarete I. Ragsdale: Mane E. Ragsdale; Mrs. Ethel Rainbolt; Oscar Rainville; 0. Reyes, Ralph Richardson: Rebecca Richardson; L. Richardson; V. J. Richens. J. R. Rabbi; Ernest V. Romney; Eugene Romney; Julius Romney; F. E. Rose; W. T. Sanders; K. K. Schade; Frank Schultz; School District no. 2. County of Hidalgo, State of New Mexico; School District No. 7, County of Hidalgo, State of New Mexico; Andy Scott; Brooks Scott; Seoton Canal Company; R. Sexton; Deletes B. Shirk: Laura Short; Shriver Ditch Company; W. F. Shriver; Mrs. E. M. Simmons; Jesse B. Sissa; Sinclair Realty Company; Henry L. Smith; J. 0. Smith; V. Soto; Emma Spoon, Administratrix of the Estate of J. H. Spoon, doomed; A. L. Stewart; U. B. Stewart; Mrs. R. S. Stewart, George W. Stinson; W. P. Stover; Nicholas Saurez; Florence R. Swofford; Sunset Canal Company; Gharles Telles; Ban R. Tilley; W. D. Tucker; George Utter; Valley Canal Company; Virden Irrigation District; Peter Wahline; Alvin Warner; J. L. T. Batters; B.Whipple, West White; Joe Whittridge; W. W. Wilkey: 0. 1. Wilkins; E. J. Wilkins; J. 0. Wilkins; Lila Williams; Roy D. Williams; Mrs. T. M. Williamson; B. A. Wilson; George A. Wilson; Page S. Windham; N. C. Wright; George Wyatt; York Canal Company; and York Cattle Company; B. E. Bowers; J. I$. Payne, Trustee, Church of Jesus Christ of Latter Day Saints; A. C. Cruwell: M. H. Jensen; Milton N. Jensen; A. Keller; Maude Larsen; Mitchel McDonald; O. Mortensen;

Appendix A

Amanda Nations. N. D. Patton; 0. Q. Payne, Helen A. Payee; E. R. Richens; R. Richens; School District No. 27. County of Greenlee, State of Arizona; Nancy A. Smith; and E. Thyjeriod.

GIBBS AND GIBBS BY B. H.
Gibbs and Gibbs.
Solicitors for the defendant
T. H. B. Glasspie.

BAKER AND WHITNEY,
BY A. B. BAKER.
Baker and Whitney,

Solicitors for the defendant
Arizona Eastern Railroad Company.

H. S. NORVIEL,
N. S. Norviel, Esq.,
Solicitor for the following defendants: Catherine A. Norviel; Helen Slaughter. and H. D. Thornton,

FLOYD K. STAHL.
Floyd II. Stahl, Esq.,
Solicitor for the following defendants:
John H. Dennison; Pearl Dennison; Stowe Phelps; and O. 1. Purdy.

CHALMERS. FENNEMORE & NAIRN, BY H. B. FENNEMORE,
Chalmers, Fennemore and Nairn, Solicitors for the following defendants:

Appendix A

Nevada Consolidated Copper Company; Ray Consolidated Copper Company; and H. N. Fennemore and Kennecott Copper Corporation.

LEO J. HOLZWORTH
Lee J. Holzworth, Esq.,
Solicitor for the defendant Jomeph J. Anderson.

CHAS . H . REES,
Charles H. Reed, Esq.,
Solicitor for the following defendant:

Town of Florence.

0. J. BAUGHN,
Otis J. Baughn, Esq., for himself and as Solioitor for The following defendants:

Margaret P. Brown; Estate of Dorm M. Clark; Mire E. Doran: Llama J. Fulton. Wlliam G. Knight; Rafael 0. Larona, Lola LeBaron; H. H. McNeiL: Helen S. Sheafe; Charles M. Sheafer; James S. Sheafe.

ROBERT DENTON,
Robert Denton, Esq., for himself and as Solicitor for
the following defendants:
Florence-Casa Grande Water Users Association; Mark Twain Clemens; Sari 0. Clemens; Edith W. Clemens; Basal H. Clemans; Winnefred P. Clemans; J. Clemens, Jr.

Appendix A

SIDNEY SAPP,
Sydney Sapp, Esq. solicitor for the following defendants:
E. B. Newman, Administrator of the Estate of H. H. Scorce, deceased; S. V. Newman.
The following defendants sign for themselves individually,

ERNEST W. McFARLAND,
Ernest W. McFarland.

GRADY. HERRING,
Grady L. Herring.

CUM M BROCKWAY,
George M. Brockway

PETER OVERFIELD,
Peter Overfield.

Filed June 29, 1935.

J. LEE BAKER, Clerk,
United States District Court for the District of Arizona,
by WM. H. LOVELESS, Deputy Clerk.

APPENDIX B — MINUTE ORDER OF THE SUPERIOR COURT OF ARIZONA MARICOPA COUNTY FILED APRIL 4, 2002

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

04/04/2002

CLERK OF THE COURT
FORM V000

R. Luiszer
Deputy

HONORABLE EDDWARD BALLINGER, JR.

W-1, W-2, W-3, W-4 (Consolidated) W1-206

In Re the General Adjudication of All Rights to Use Water in The Gila River System and Source

MINUTE ENTRY

To facilitate effective argument on the matters to be considered at the April 23, 2002 hearing to be held in this case, the following schedule will be in effect:

A. City of Safford's Motion to Strike Gila River Indian Community's Motion for Partial Summary Judgment (15 minutes).

1.	Movants	10 minutes
2.	Respondents	5 minutes

Appendix B

B. Motions Pertaining to the Preclusive Effect of the *Globe Equity No. 59* Decree on the San Carlos Apache Tribe (95 minutes).

1.	San Carlos Apache Tribe	18 minutes
2.	Gila River Indian Community	18 minutes
3.	United States	6 minutes
4.	City of Safford	9 minutes
5.	State of Arizona Agency Claimants	9 minutes
6.	Gila Valley Irrigation District and Franklin Irrigation District	9 minutes
7.	San Carlos Irrigation and Drainage District	9 minutes
8.	ASARCO, Incorporated	9 minutes
9.	Phelps Dodge Corporation	5 minutes
10.	Salt River Project	3 minutes

C. Motions Pertaining to the Preclusive Effect of the *Globe Equity No. 59* Decree on the Gila Valley Irrigation District and Franklin Irrigation District (60 minutes).

1.	Gila River Indian Community	10 minutes
2.	ASARCO, Incorporated	10 minutes
3.	Gila Valley Irrigation District and Franklin Irrigation District	10 minutes
4.	San Carlos Apache Tribe	10 minutes

5.	United States	4 minutes
6.	City of Safford	4 minutes
7.	San Carlos Irrigation and Drainage District	4 minutes
8.	Phelps Dodge Corporation	4 minutes
9.	State of Arizona Agency Claimants	4 minutes

Counsel may stipulate to alternative time allocations and submit those to the Court prior to commencement of arguments. It would be helpful if counsel for parties holding similar positions would agree among themselves as to who will present argument on each issue and the allocation of time. Parties on each issue will be allowed to reallocate their allotted time among themselves so that one party may utilize any remaining time not used or reserved by another party to that issue.

In addition, any party wishing to be heard must have filed motions papers relating to the matters to be heard, or a terse statement adopting the position of another party. Counsel shall present to the Court a written schedule of any suggested changes to the presentations prior to commencement of the arguments.

* * * *

A copy of this minutes entry is mailed to all parties on the Court-approved W-1, W-2, W-3 and W-4 (Consolidated) mailing list dated February 7, 2002. This is also the Court-approved mailing list for Contested Case W1-206.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED SEPTEMBER 30, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLOBE EQUITY NO. 59 (JCC)

UNITED STATES OF AMERICA,

Plaintiff,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff in Intervention,

and

SAN CARLOS APACHE TRIBE,

Plaintiff in Intervention,

v.

GILA VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

Appendix C

MEMORANDUM AND ORDER

The matters now before the court consist primarily of the unresolved issues referred to the Rules Committee pursuant to the pretrial order entered in November, 1991 and the court's memorandum and order following the November, 1991 trial. *United States v. Gila Valley Irrigation District,* 804 F. Supp. 1 (D. Ariz. 1992). The court also requested briefing on various issues relating to the trial scheduled to commence November 7, 1994. A hearing on the matter was held in Tucson, Arizona from May 11-13, 1993.

The factual background to this dispute and the Gila River Decree generally is copiously reviewed elsewhere, and thus will not be repeated here. *See United States v. Gila Valley Irrigation District,* 454 F.2d 219 (9th Cir. 1972); *Gila Valley Irrigation District v. United States,,* 118 F.2d 507 (9th Cir. 1941); *United States v. Gila Valley Irrigation District, et al.,* 804 F. Supp. 1 (D. Ariz. 1992).

I. ADWR's Proposed Study

Issue — Should the court accept the offer made by the Arizona Department of Water Resources ("ADWR") to conduct a study free of charge to determine what lands in the Upper Valleys have been permanently removed from agricultural use, and if so, should its findings be binding on the Commissioner?

Appendix C

A. Background

Under Articles V and XI of the Consent Decree, the amount and rate of water that may be diverted by the Upper Valley Defendants ("UVDs") is tied to the number of acres "then being irrigated" by the UVDs. In other words, the Decree contemplates that the UVDs' water rights will depend on the amount of land in the upper valleys being used for farming purposes. Following the November, 1991 trial, the court observed:

> [t]he evidence at trial indicates that the water commissioner allows diversions without considering whether land is "then being irrigated." Rather, diversions are based simply on the decreed acreage.

United States v. Gila River Irrigation District. et al., 804 F. Supp. 1, 16 (D. Ariz. 1992). The court also noted that the failure to factor in the amount of land not being irrigated significantly increased the quantity of water allocated to the UVDS, to the detriment of the San Carlos Apache Tribe ("Apache Tribe"). To eliminate this unfairness, the court concluded that

> [t]here is little dispute that the commissioner should be directed to determine what acreage has been permanently removed from agricultural use. Clearly, such acreage includes lands now occupied by buildings, streets, roads, and parking lots within the districts. Such acreage, once identified,

> should then be subtracted from the total acreage from which diversions are calculated.

Id. at 16.

In accordance with this finding, the court directed the Rules Committee to formulate a method for determining lands permanently removed from agricultural use and how that determination should be applied to individual farmers and to specific tracts of decreed land. Unfortunately, the Rules Committee was unable to reach an accord on these issues, and the matter was briefed for argument at the May, 1993 hearing.

In October of 1992, the ADWR generously offered to conduct a special study for the Rules Committee and the court, which will identify land permanently removed from agricultural use.[1] It should be noted, however, that this study will not determine lands not "then being irrigated," but rather, only the total acreage removed from agricultural production because of urban or farming-related development such as parking lots, roads, barns and canals. This study is anticipated to be completed sometime in the Spring of 1994. On the basis of the testimony of an ADWR representative at the May, 1993 hearing, the court is satisfied that ADWR will conduct the study with the highest degree of professionalism and fairness.

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1. As the court observed at the hearing, ADWR's offer is much appreciated. Indeed, it is difficult to envision the quandary the court and the parties would face had ADWR not offered to conduct the study.

Appendix C

B. Discussion

The parties do not dispute that the court should accept ADWR's offer to conduct the study. The principal issues, therefore, are how the ADWR Report should be used by the Water Commissioner and the procedure by which ADWR's determinations may be challenged by affected upper valley farmers.

On the basis of the arguments set forth in the briefing and at the hearing, the court hereby adopts the following rule governing challenges to the determinations contained in ADWR's Report:

(1) Counsel for the Water Commissioner, San Carlos Apache Tribe, Gila River Indian Community, the United States, and the Upper Valley Defendants shall jointly be responsible for notifying all potentially interested parties that the ADWR will be conducting its study.

(2) Following release of the initial draft of the ADWR Report, there will be a comment and review period of 30 days. During this 30 day period, a party may discuss informally with the Water Commissioner any difficulties he or she has with ADWR's initial draft. A party who chooses not to engage in an informal discussion with the Water Commissioner, or continues to be dissatisfied despite such a discussion, may submit a written objection to the ADWR Report to the Water Commissioner. It should be noted, however, that to have standing to file a complaint in the United States District Court, a party must have attempted to resolve the dispute by submitting a written objection to the

Water Commissioner within the comment and review period or must show exceptional circumstances justifying his or her failure to do so.

(3) Within 10 days of receiving a written complaint, the Water Commissioner shall notify interested parties of the objection, and any additional parties that request notice of written objections. Within 30 days of receiving notice of an objection, an interested party may file with the Water Commissioner a short and concise response to the objection.

(4) The Water Commissioner may require that a fee, to be approved by this court, be submitted along with a written objection to cover costs associated with considering the objection and notifying other interested parties of the objection.

(5) Within 90 days from the date the initial draft of the ADWR Report is released, the Water Commissioner shall review all written objections to the Report and forward those which he deems meritorious to the ADWR. The Commissioner shall promptly inform any party whose objection is not forwarded to ADWR of that decision.

(6) In the course of determining whether a written objection has merit, the Water Commissioner may, but is not required to, make factual inquiries including, but not limited to: (1) inspecting a particular piece of land; (2) consulting maps, charts, graphs and other such aids; and (3) discussing the objection with the complaining party and other persons who may have knowledge relating to the objection. Under no circumstances will the Water Commissioner conduct evidentiary hearings or adversary proceedings.

(7) Upon receipt of the written objections that the Water Commissioner concludes have merit, ADWR may conduct further inquiry into the legitimacy of the objection, and may alter or decline to alter its Report as it deems appropriate.

(8) Provided that a timely objection to the initial draft of the Report was filed with the Water Commissioner, a party dissatisfied with ADWR's final report on an issue contained in its written objection to the Water Commissioner may file a complaint with the United States District Court for the District of Arizona. The proceedings in the U.S. District Court will be governed by the summary review procedures discussed in Section VI below. No presumption of validity will apply to any determination of the Water Commissioner or ADWR.

II. Priority Rights Versus Apportionment Rights

Issue — Does the Decree require the Upper Valley Defendants to deplete their water rights acquired through apportioning before diverting water they are entitled to by priority?

A. Background

The Decree gives the UVDs two separate and distinct rights to divert water from the Gila River. First, the UVDs have the right to take water in accordance with the Priority Schedule set forth in Article V of the Decree. Under Article V, after subtracting the water to which the Native Americans below the dam are entitled, remaining water is distributed among the UVDs according to priority date, that is, the earlier

a farmer's priority date the higher his or her priority ("priority rights"). Second, Article VII of the Decree gives the UVDs an additional right to divert water apportioned on the basis of the water height of the San Carlos Reservoir (hence, "apportionment rights").

Since the Decree was first implemented in 1935, the various Water Commissioners have consistently interpreted the Decree as allowing the UVDs to divert water obtained by way of priority before the UVDs have depleted apportioned water. The San Carlos Apache Tribe contends, however, that the Decree and this Court's Memorandum and Order following the November, 1991 trial require the UVDs to exhaust their apportioned water before exercising their right to divert priority water.

B. Discussion

The Apache Tribe argues with vigor that Article VIII(5) of the Decree supports its position that the UVDs must use apportioned water prior to diverting priority water. That provision reads:

> PROVIDED ALWAYS, that if by reason of lack of available storage in the San Carlos Reservoir no apportionment of the natural flow of said river is or can be made available to said defendants, then the diversions of said defendants, *of or as soon as apportionments previously made to them have been consumed,* shall no longer be made in disregard of the prior rights of plaintiff below said San Carlos Reservoir, but shall instead be made

> under and in accord with the rights and priorities set down in Article V, and the Priority Schedule made part hereof, and Article VI of this decree to-wit. . . .

Consent Decree, Art. 8 ¶ 5 (emphasis added). According to the Apache Tribe, this language is clear and unambiguous: "*[p]rovided always*" when the UVDs have apportionments to divert, they shall divert on apportionments. On the other hand, when they have exhausted their apportionments, then they *shall,* divert on priorities. The Apache Tribe thus submits that the Water Commissioner's current practice of allowing the UVDs to divert priority water before depleting apportioned water violates the Decree. In particular, they allege that this practice improperly permits the UVDs to divert priority water while at the same time accumulating stored apportionments to be diverted later. According to the Apache Tribe, Article VIII(5) must be strictly applied by the Gila Water Commissioner to disallow diversions on priority when apportionments are available for diversion.[2]

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2. The UVDs, with whom the Commissioner concurs, challenge the Apache Tribe's standing to assert this argument. According to the UVDs, because the court held following the 1991 trial that the Apache Tribe's rights are superior to both the UVDs' apportionment and priority rights, that the Apache Tribe is not affected by the UVDs diverting priority water before apportioned water. While provocative, this argument was nullified by the Gila River Indian Community — which indisputably has standing — joining the Apache Tribe's request that the court require the Commissioner to discontinue simultaneous use of apportioned and priority water by the UVDs.

Appendix C

On the basis of the evidence submitted at the November, 1991 trial, the court ruled that the 1924(b) priority must be abolished. In so doing, the court remarked:

> [w]hen water is apportioned to UVDs, they may divert on these apportionments. When the apportionments are exhausted, or cannot be made due to lack of available storage, UVDs must revert to diverting only on priority. Decree, Article VIII(5).

Gila River, 804 F. Supp. at 13. The Apache Tribe argues that this language conclusively resolved the issue regarding the UVDs' concurrent use of priority and apportioned water. This argument, however, derives from a strained reading of the court's order, as the above-quoted language merely states that priority water is available when apportioned water is exhausted or when no water is stored in the reservoir, and does not specifically preclude use of diverted and apportioned water simultaneously.

It is not disputed that over the 55 years of enforcing the Decree, the various water commissioners have consistently permitted the UVDs to divert priority waters before exhausting apportionment rights. Moreover, immediately following implementation of the Decree, no party, including the Decree's drafters, objected to the UVDs diverting apportionment water and priority water concurrently. Indeed, over the long course of litigation concerning the Gila River Decree, no party, until now, has ever raised the issue of whether the Water Commissioners have erroneously interpreted the Decree on this point. It seems evident to the

court that if the Apache Tribe's novel construction of the Decree had merit, someone would have raised it previously. That the drafters of the Decree voiced no objection is particularly probative, for it is reasonable to assume that counsel for the United States would have monitored implementation of the Gila River Decree with a critical eye.

Finally, even assuming the possibility that the construction of the Decree urged by the Apache Tribe is correct, but simply was not asserted until the Apache Tribe's particularly able counsel entered the case in 1989, the court nonetheless feels constrained by the long-standing interpretation of the Decree. To abruptly and significantly alter a critical aspect of the Decree's settlement scheme at this late date would work an undue hardship on the upper valley farmers who have come to rely on consistent interpretations of the Decree's essential provisions. Accordingly, the court holds that the UVDs need not exhaust water derived from apportionment rights prior to diverting on priority water.

III. Sudden Freshets

Issue — Should the Court adopt a rule providing for diversions of water in excess of 1/80th c.f.s. in order to take advantage of sudden freshets, and if so, what type of rule is appropriate?

A. Background

A sudden freshet is a rise in a stream or river caused by heavy rains. The Decree limits the rate of diversion by the

UVDs to 1/80 cubic feet per second per acre. However, Article V, the so-called "sudden freshets" clause, provides that the Commissioner may permit the UVDs to divert water at a rate in excess of 1/80 c.f.s per acre "in order to take proper advantage of sudden freshets or other periods of more plentiful natural flow in the stream" provided that (1) "no injury will result to others not being so accommodated and (2) that the total diversion for the lands involved do not exceed six acre feet per acre per year." In 1972, the Ninth Circuit affirmed this court's ruling that the "so being accommodated" language prohibited the Commissioner from accelerating water diversions without regard to the lower valley users. *United States v. Gila Valley Irrigation District,* 454 F.2d 219, 221 (9th Cir. 1972).

One of the tasks assigned to the Rules Committee was formulating a rule governing the use of sudden freshets. Specifically, the Pre-Trial Order dated November 12, 1991 directed the Rules Committee to consider the following when crafting such a rule: (1) under what circumstances may the Water Commissioner authorize the UVDs to take advantage of sudden freshets or more plentiful natural flow by diverting from the natural flow at a rate greater than 1/80 c.f.s, and (2) what standard should be adopted to determine when "no injury will result" from the application of the sudden freshets clause. Regrettably, the Rules Committee was unable to reach a consensus on how to regulate the use of sudden freshets.

B. Discussion

The parties do not dispute that any rule adopted by the court must comport with the Ninth Circuit's 1972 decision,

and thus excess diversions that would cause the UVDs to exceed their 6 acre foot per acre of land limitation or their 120,000 acre foot consumptive use limitation will not be permitted under any circumstances. Beyond these fundamental requirements, however, the court agrees with the UVDs that it is not possible to draft a succinct and manageable rule encompassing every possible permutation in the flow of the Gila River. Under these circumstances, the court concludes that the Water Commissioner must be afforded some degree of discretion to ensure that the rights of the lower valley users are not impinged and, where possible, avoid wastage.

To aid the Commissioner in the exercise of his discretion, the following factors, in addition to the above-referenced conditions, should be considered when deciding if the UVDs may divert excess water pursuant to the sudden freshets clause: (1) whether the releases from Coolidge Dam are creating a spill at Ashurst-Hayden Dam, and (2) whether the combined flows of the San Pedro River and releases of water from Coolidge Dam are resulting in spilling at Ashurst/ Hayden Dam. If one or both of these conditions are met, the UVDs should normally be allowed to divert excess water under the sudden freshets clause. However, even where one or both conditions are met, the Commissioner may appropriately deny permission to utilize a sudden freshet if so doing might abridge the rights of the lower valley users. Also, the Commissioner, in exercising his discretion, may conclude in extraordinary circumstances that the UVDs should be permitted to divert sudden freshet water despite the absence of either of the two above-referenced conditions. Finally, if either of these spill conditions exist, the Water

Commissioner must be satisfied that the releases from Coolidge Dam have not been changed so as to stop the spilling at Ashurst-Hayden.

It should be noted that this is merely an interim rule, and that a new rule will be fashioned upon completion of a reliable call system. As for the Gila Crossing, the court concludes that this issue should not be addressed until the conditions for water diversions at Gila Crossing are fully known.

IV. Changes in Points of Diversion and Places, Means, Manner or Purpose of the Use of the Waters of the Gila River

Issue — Should the court adopt the rule drafted by the Water Commissioner which sets forth a procedure governing transfers of water rights prescribed by the Decree?

In applicable part, Article XI of the Decree provides that

> any of the parties to whom rights to water have been decreed herein shall be entitled, in accord with applicable laws and legal principles to change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or any part thereof, so far as they may do so with out injury to the rights of other parties as the same are defined herein.

In its Memorandum and Order dated September 15, 1992, the court directed the Rules Committee to prepare and submit

proposed rules for transferring water rights. These rules were to be substantially similar to the Arizona water transfer statute, and provide adequate notice of proposed changes to the parties to the Decree and for summary review by the court. *Gila River,* 801 F. Supp. at 12. After several meetings of the Rules committee, however, it became apparent that agreement would not be forthcoming. Accordingly, on the basis of the arguments set forth in the briefing and at the May, 1993 hearing, the court hereby adopts the following rule governing the transfer of water rights under the Decree:

Section 1. *Application for change in the point of diversion, place, means, manner or purpose of the use of waters subject to the Gila Decree*

A. An application for a change in the point of diversion, place, means, manner or purpose of use of waters subject to the Gila Decree shall be filed with the Gila Water Commissioner (a "Change in Use Application").

B. The applicant, shall, at the time of filing the Change in Use Application with the commissioner, pay a filing fee, to be determined by the Commissioner and approved by the court, and shall deposit with the Commissioner an amount sufficient to cover all costs associated with the processing of the Change in Use Application, including mailing and publication costs.

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C. The application shall be in such form as prescribed by the Commissioner and shall include:

1. Name, address and telephone number of the applicant;

2. Location of existing point of diversion or place of use (legal description and map/survey) and proposed new manner of use;

3. Location of proposed new point of diversion of place of use (legal description and map/survey) and proposed new manner of use;

4. Quantity of water involved in the change and rate of diversion (if only a portion of the water right is proposed to be transferred, a statement of how remainder will be used);

5. Purpose for which the application is filed;

6. Reference to the Gila Decree wherein the water right was defined and adjudicated and the priority date of such right;

7. Purpose of existing use and proposed purpose of use;

8. Name, address and telephone number of irrigation district or project within which existing right is used;

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9. Name, address and telephone number of irrigation district within which the right would be transferred to;

10. Name of canal company presently delivering water under right and name of canal company which would deliver water under proposed transfer;

11. A description of the historical use of the water right for the last ten (10) years; and

12. Such other information as may be necessary to permit complete understanding of the proposed change.

D. The application shall be accompanied by the written consent and approval of the governing body of each irrigation district, irrigation project and canal company named in C.8, 9 and 10 above or the statement of the applicant that a written request for such consent and approval was delivered or mailed, return receipt requested, to such body and forty-five (45) days have elapsed since the receipt of the application and request for approval by such body. Failure of such governing body to approve or reject the proposed application within 45 days after receipt shall constitute approval of the application.

E. A separate application must be filed for each water right affected by the proposed change or changes.

F. The applicant shall state under oath that the information contained in the application is true and correct, to the best of the applicant's knowledge at the time of filing.

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G. Failure to provide the foregoing information and approvals will result in rejection of the application.

H. (1) No change in the point of diversion, place, means, manner or purpose of use shall be made under these Rules with respect to any decreed right to water which, under applicable law, has been forfeited or abandoned.

(2) The Commissioner is not authorized to make any determination as to whether a water right has or has not been abandoned or forfeited. If an objection to an application is that the water right has been abandoned or forfeited, such objection shall be determined in proceedings before the United States District Court under Section 4 herein, and the Commissioner shall not deny an application on the basis of abandonment or forfeiture.

I. If the Commissioner denies an application for any reason the applicant shall have the right to have the application heard by the court upon filing of a complaint as provided in Article XII of the Gila Decree; provided that such complaint shall also be served in accordance with Federal Rule of Civil Procedure 5(b) on the parties listed in Section 2, paragraph B.

J. If the Commissioner denies an application because the applicant has failed to comply with any provision of these rules, the applicant may file another application with the Commissioner which complies with these rules.

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Section 2. ***Notice of Change in Use Application***

A. Any party holding a water right adjudicated under the Gila Decree may file a written request with the Commissioner for special notice of all Change in Use Applications filed pursuant to these rules. The request shall state the mailing address of the party. The Commissioner shall keep a list of such requests. The Commissioner may periodically, but not more frequently than once a year, require by written notice to each such party a renewal of such request for notice.

B. Within 30 days after the application is filed the Commissioner shall send, by certified mail, return receipt requested, a copy of the application, together with a copy of a written notice setting forth the date by which objections to the application must be filed in the office of the Commissioner, to: The United States, c/o The United States Department of the Interior, Office of the Field Solicitor; Bureau of Indian Affairs, Phoenix Area Office and Superintendent, San Carlos Agency; The Franklin Irrigation District; The Gila Valley Irrigation District; The San Carlos Apache Tribe, The Gila River Indian Community; The San Carlos Irrigation and Drainage District; The San Carlos Project; The State of Arizona, c/o the Attorney General; ASARCO, Inc.; any canal companies named in the application and to each party who has filed with the Commissioner a request for special notice. Parties to whom notice is to be mailed shall file with the Commissioner a list of names and addresses to which the notice shall be mailed which may include counsel for such parties.

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C. The Commissioner shall also cause a copy of the notice of Change in Use Application to be published once a week for three successive weeks in a newspaper of general circulation in the county and counties in which the change is to occur (and in the counties of Greenlee, Graham, Pinal and Maricopa, Arizona).

D. The notice of Change in Use Application shall set forth:

(1) That the application has been filed;

(2) The date of filing;

(3) The name and address of the applicant;

(4) The location of the existing point of diversion or place of use and present manner of use;

(5) The location of the proposed new point of diversion or place of use and proposed new manner of use;

(6) The quantity of water involved in the proposed change;

(7) Names of irrigation district or irrigation project and canal companies affected by the proposed change;

(8) The purpose for which the application has been filed;

(9) Date by which objections must be filed with the Commissioner.

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Section 3. *Objections to Change is Use Application*

A. An objection to a Change in Use Application may be filed under these rules only by a person, corporation, governmental agency, Indian Tribe or other entity holding a water right under the Gila Decree for itself or in trust for another.

B. An objection to the application shall be in writing and verified and shall be filed in the office of the Commissioner on or before the date specified in the notice which shall be a date 90 days after the date of the last publication of the notice. An objection shall set forth the name, address and telephone number of the objector and shall set forth the grounds for the objection in a manner to permit complete understanding of the objection.

C. Within ten (10) business days after an objection is filed, the objecting party shall send a copy of the objection in the manner and to the parties specified in paragraph 2.B above. An objection shall also be filed within such time with the United States District Court which shall be served in accordance with Federal Rule of Civil Procedure 5(b).

D. If no objection to the application is filed in the Office of the Commissioner on or before the date specified in the notice, the Commissioner shall grant or deny the application on the basis of the information contained in the application. If the Commissioner approves the application, the Commissioner shall forthwith file the application with the Clerk of the Court with the Commissioner's affidavit setting forth the matters contained in the notice and stating that no

objection has been filed pursuant to these Rules and that the Commissioner has approved the application and shall submit an order to the court for the court's approval of the change in use. The applicant shall be responsible for the costs of preparation of such affidavit and order.

E. A party who fails to file a timely objection with the Commissioner may not object to a proposed transfer during review by the court.

Section 4. ***Proceedings Before the Court***

A. Upon the filing and service of an objection as provided in Section 3, paragraph B, the applicant or objector may request an evidentiary hearing before the court. The Federal Rules of Evidence shall apply to such hearings and the matter shall be tried without a jury.

B. The applicant shall have the burden of establishing a prima facie case of no injury to the rights of other parties under the Gila Decree and a right to transfer. Upon making such a prima facie showing, the burden of proof will shift from the applicant to the objecting party to demonstrate that injury will result from the proposed change or that the applicant has no right to the proposed transfer.

C. The decision of the court regarding a Change in Use Application shall not take effect until the court enters an order approving the change and such decision becomes final. The applicant or objecting party shall have the right to appeal the order in accordance with the Federal Rules of Appellate Practice.

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D. A party may seek an expedited hearing before the court upon a showing of exigent or exceptional circumstances by filing a motion for an expedited hearing at the time a complaint is filed or subsequent to filing of a complaint as warranted by the circumstances.

E. A party found to have filed a frivolous Change in Use Application or asserting a frivolous objection thereto may be assessed costs at the discretion of the court.

V. Call System

Issue — Discussion *on* the court's direction to the Rules Committee that the 1924(b) priority system be replaced with a call system.

In its order following the last trial, the court ruled that a call system must be implemented to replace diversions on the basis of priority. The court stated:

> [b]ased on this analysis, the Court concludes, first, that the 1924(b) priority practice must be abolished. In its place the Rules Committee is directed to develop and recommend a system allowing for the exercise of prior calls on the flow of the Gila River. Such a system may or may not be similar to that proposed by the GRIC, but it must adequately account for the typical lag in the water's travel downstream between Duncan-Virden, Safford, the San Carlos Reservoir, and Ashurst-Hayden Dam.

Gila River, 804 F. Supp. at 15. The court subsequently directed the Rules Committee to confer with Gookin Engineering to determine what issues are likely to develop. Because this project, as with most issues involving the Decree, proved considerably more difficult than appeared at first blush, the Rules Committee was unable to do so prior to the May, 1993 hearing. For the same reason, Gookin Engineering has yet to finish preparing a proposed call system. The court therefore refers to the Rules committee all issues surrounding implementation of the call system currently under design by Gookin Engineering.

VI. Summary Review

Issue — What type of summary review procedure should be implemented to expedite resolution of comparatively minor disputes and what role should the Water Commissioner play in such a scheme?.

All parties agree that some type of summary review procedure is needed so that a complaint need not be filed with this court whenever someone believes that the Commissioner has erred. The parties disagree, however, on the appropriate role of the Water Commissioner in any such summary review procedure.

The relevant portion of the Consent Decree is Article XII, which states:

> any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after

> service of a copy of such complaint on the Water Commissioner, and the Court shall promptly review such action or order and make such order as may be proper in the premises;

At the January, 1993 Rules Committee meeting, counsel for the UVDs agreed to draft a proposed rule setting forth a summary review procedure. The resulting proposed rule drafted by the UVDs generated considerable opposition from the parties, in particular, Section II, which requires that disputes first be presented to the Water Commissioner for resolution.

The United States, the Apache Tribe, and the GRIC oppose section II of the UVDs' proposed rule on the ground that it places the Commissioner in an adjudicative role in violation of the Decree. These parties argue that Article XII of the Decree specifically states that a party dissatisfied with any action of the Commissioner may file a complaint in the District Court. Therefore, according to these parties, requiring a party to first file a complaint with the Water Commissioner would impermissibly alter the terms of the Decree.

This argument has merit. Under a strict reading of Article XII, a party dissatisfied with "any action" of the Water Commissioner may file a complaint in this court after serving the Commissioner, whereupon his or her complaint must be "promptly" reviewed. Consent Decree, Art. XII. The Decree simply does not limit court review to final or challenged actions of the Commissioner. Because the process for challenging the Commissioner's actions is set forth in considerable detail, it is reasonable to infer that the Decree's

drafters did not intend additional procedures to be added. The court therefore rejects the UVDs' proposal that complaints first be considered by the Commissioner.

In light of the court's determination that the Commissioner is not to serve in an adjudicative role, the court hereby directs the Apache Tribe to revise the proposed rule submitted by the UVDs, and to present this revised version to the Rules Committee. To aid in the drafting of such a rule, the parties are advised that, in consideration of the enormous complexity of the Decree, the court will not approve a rule which provides for evidentiary hearings to be referred to another judge or magistrate of this court as a matter of course. Instead, summary review by another judge or by a magistrate should be limited to exigent or extraordinary circumstances.

VII. Article VIII(4)

Issue — How should the Commissioner interpret the "proper irrigation of 80,000 acres of land" provision in Article VIII(4)?

Article VIII(4) provides

> [t]hat water released at the will of the plaintiff and for the purpose of the plaintiff from the San Carlos Reservoir at any time after the date of this Decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos Project, shall be considered as stored in the San Carlos Reservoir at and after the date

> of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.

Decree, at p. 107.

As originally framed, the primary issue concerning interpretation of Article VIII(4) was the meaning of "for the proper irrigation of 80,000 acres." At the hearing, it became clear that above-quoted language is arguably subject to multiple interpretations. Although not briefed, most of the discussion at the hearing concerned whether Article VIII(4) requires that the UVDs' apportionment rights be calculated on the basis of the amount of water above the penstocks at Coolidge Dam — as the Water Commissioner has been doing since implementation of the Decree — or whether, as the lower valley users and the United States contend, the apportionment rights of the UVDs should be calculated on the basis of the water in the dam in excess of the amount required for the "proper irrigation of 80,000 acres."

As the parties acknowledged at the May hearing, this is a crucial issue, involving at least tens of thousands of acre feet of water. Transcript, pp. 286-327. The lower valley users and the United States rely chiefly on a letter drafted by Mr. Iverson, counsel for the United States at the time the Decree was entered. The UVDs, in turn, objected at the hearing that they did not realize that the lower valley users would be arguing their novel interpretation of Article VIII(4) until that day, and pointed out that the issue had not been briefed. On August 2, 1993, the UVDs filed a motion

requesting that a ruling on this issue be delayed until completion of the discovery currently underway. It appearing to the court that additional discovery is required, the motion is granted. The parties are directed to inform the court upon completion of discovery, and to submit a stipulated briefing schedule for the court's approval.

VIII. Winkelman Report

Issue — How should the Winkelman Report be used in enforcing the consumptive use limitation?

Under the Decree, the yearly consumptive use limit for the UVDs is 120,000 acre feet. The Decree further requires the Water Commissioner to reduce diversions in the upper valleys, in the inverse order of priority, to the extent necessary to ensure that consumptive use in the upper valleys never exceeds the 120,000 acre feet limit.

Enforcing the consumptive use limitation has not been a major source of contention. Rather, it appears that since the Decree's inception in 1935, the limit has been exceeded in just six years, the most recent being 1975, a year when water was plentiful. Nonetheless, the Commissioner who preceded Mr. Weesner advised the court during the 1990 that he needed assistance in enforcing the limitation. Accordingly, the Court authorized Ms. Winkelman, a graduate student at Arizona State University, to conduct a statistical study of consumptive use in the upper valleys. That study has now been completed and submitted to the court.

The Water Commissioner urges that the Winkelman

Report be used as a guide, and cautions that rigid adherence to the Report would be imprudent. According to the Commissioner's retroactive application of the Winkelman recommendations to previous violation years, the reduction in diversions recommended by the Report would have surpassed the amount necessary to avoid exceeding the limitation, thereby depriving the UVDs of entitled waters. Thus, while the Commissioner considers the Report helpful, he feels that he should not be bound by its proposed methodology.

At the May, 1993 hearing, all parties agreed that the Winkelman Report, while instructive, should not be binding on, the Commissioner. Accordingly, the Commissioner shall, within his discretion, utilize the methodology set forth in the Winkelman Report insofar as he finds it beneficial. As such, the Commissioner may reject all or part of the Winkelman methodology when enforcing the 120,000 acre feet consumptive use limitation. Of course, the Rules Committee may fashion a more accurate method of enforcement if it so chooses.

IX. The November, 1994 Trial.

Issue — What issues should be adjudicated at the trial currently scheduled for November 7, 1994, and in what manner should those issues be tried?

A consensus was reached at the May, 1993 hearing that, in addition to the water quality issue, all unresolved issues pending before the Rules Committee should be adjudicated at the November 7, 1994 trial provided that no conflicts of

interest arise for counsel and all interested parties receive adequate notice. Transcript, p. 363. It is the court's hope that the upcoming settlement discussions and future Rules Committee meetings will resolve many of these pending issues.

At the May, 1993 hearing, counsel for the UVDs expressed concern over potential conflicts of interest should the court elect to adjudicate the impact of particular insecticides and fertilizers used by the upper valley farmers on the quality of the water available to the lower valley users. The court appreciates the concern of counsel; accordingly, the trial will be limited to the general question of whether the insecticides and fertilizers used by the UVDs must be regulated to maintain an appropriate water-quality level for the users down river from Coolidge Dam, and will be tried as a class action not subject to opting out. *See* F. R. Civ. P. 23(b). For the same reasons, the court will similarly limit the November, 1994 trial to the general issue of whether pumping underground water contributes to poor water quality, and if so, whether pumping should be regulated. The court will not litigate the impact of particular wells or pumping by specific upper valley users. Finally, there being no objection to including the issue of whether the agreement between the Gila River Indian Community and ASARCO in 1977 is void as violative of the Decree, it will be adjudicated as well at the November 7, 1994 trial.

In consideration of the foregoing, and as was discussed at the hearing, the Apache Tribe is directed to submit a proposed order regarding the Cosper's Crossing issue. After such an order is signed and entered by the court, the Apache

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Tribe will mail a copy of the order to each landowner on a list, to be compiled by the Water Commissioner, of potentially interested farmers residing above Cosper's Crossing, notifying them that the issue will be adjudicated in November of 1994, and that if they wish to participate, that they need to appear or have counsel appear on their behalf.

DATED this 23 day of September, 1993.

s/ John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX D — USGS WATER RESOURCES DATA ARIZONA WATER YEAR 2005

USGS
science for a changing world

Prepared in cooperation with the State of Arizona and with other agencies

Water Resources Data
Arizona
Water Year 2005

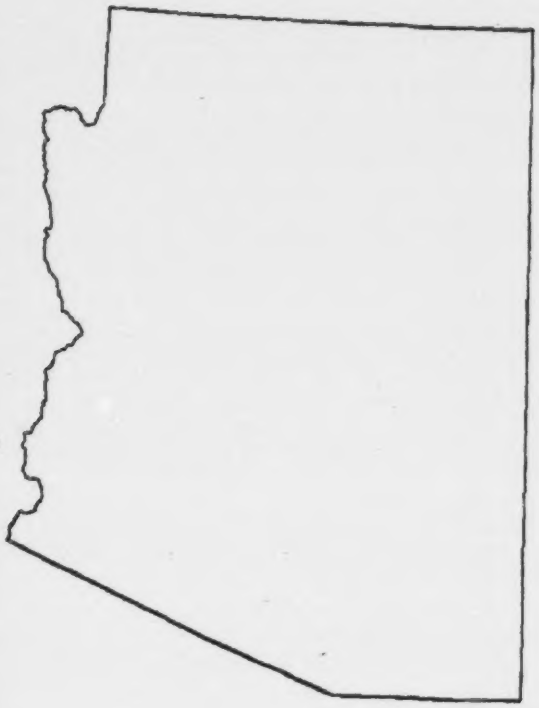
Water-Data Report AZ-05-1

U.S. Department of the Interior
U.S. Geological Survey

Water Resources Data
Arizona
Water Year 2005

By G.G. Fisk, N.P. Duet, E.H. McGuire, W.P. Roberts,
N.K. Castillo, and C.F. Smith

Water-Data Report AZ-05-1



Prepared in cooperation with the
State of Arizona and with other agencies

U.S. Department of the Interior
U.S. Geological Survey

U.S. Department of the Interior
Gale A. Norton, Secretary

U.S. Geological Survey
Charles G. Groat, Director

2006

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Additional earth science information is available by accessing the USGS home page at http://www.usgs.gov/.

09447800 BONITA CREEK NEAR MORENCI, AZ

LOCATION.--Lat 32°57'20", long 109°31'50", in SE¼NW¼ sec. 36, T.5 S., R.27 E., Graham County, Hydrologic Unit 15040005, on left bank 2 mi upstream from intake of city of Safford water supply, 6.3 mi upstream from mouth, and 12.8 mi southwest of Morenci.

DRAINAGE AREA.--302 mi^2.

PERIOD OF RECORD.--Aug. 1981 to current year.

GAGE.--Water-stage recorder. Elevation of gage is 3,500 ft above sea level, from topographic map. Two crest-stage gages 440 ft upstream on right and left banks.

REMARKS.--Records fair except for estimated daily discharges, which are poor.

EXTREMES FOR PERIOD OF RECORD.--Maximum discharge, 19,500 ft^3/s Jan. 18, 1993, gage height, 16.5 ft, from slope-area measurement of peak flow; minimum daily, 0.66 ft^3/s Aug. 31, 1988.

EXTREMES OUTSIDE PERIOD OF RECORD.--Flood of Dec. 20, 1972, 10,000 ft^3/s, from slope-area measurement made by city of Safford at site about 2 mi downstream. Flood of June 27, 1981, 1,340 ft^3/s, from slope-area measurement at present site, gage height, 5.6 ft, from floodmark.

EXTREMES FOR CURRENT YEAR.--Peak discharges greater than base discharge of 300 ft^3/s and (or) maximum (*):

Date	Time	Discharge (ft^3/s)	Gage height (ft)
Feb. 12.....	1452	*1,720	*8.47e

Minimum daily discharge, 1.3 ft^3/s, Aug. 18 to 25.

e from floodmark

DISCHARGE, CUBIC FEET PER SECOND, WATER YEAR OCTOBER 2004 TO SEPTEMBER 2005
DAILY MEAN VALUES

DAY	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP
1	2.3	2.3	2.5	3.3	4.9	9.3	3.6	2.8	1.9	1.7	1.7	1.5
2	2.3	2.3	2.5	3.4	4.8	8.6	3.6	2.8	1.9	1.7	1.6	1.6
3	2.4	2.3	2.5	3.4	4.8	8.0	3.5	2.7	1.9	1.7	1.6	1.7
4	2.3	2.3	2.6	8.6	4.9	7.8	3.5	2.6	1.9	1.7	1.6	1.7
5	2.3	2.3	2.6	15	5.7	7.4	3.5	2.5	1.8	1.7	1.6	1.7
6	2.4	2.3	2.7	8.8	6.4	7.5	3.4	2.5	1.8	1.7	1.6	1.8
7	2.4	2.4	2.7	6.4	6.4	7.3	3.3	2.5	1.8	1.7	1.5	1.9
8	2.4	2.4	2.6	5.4	6.4	7.0	3.3	2.4	1.8	1.7	1.5	2.0
9	2.4	2.4	2.7	5.0	6.3	6.7	3.2	2.4	1.8	1.7	1.6	2.0
10	2.4	2.4	2.7	4.7	7.9	6.5	3.3	2.3	1.8	1.7	1.5	2.0
11	2.5	2.4	2.8	4.6	9.0	6.2	3.3	2.3	1.7	1.7	1.5	1.9
12	2.4	2.4	2.7	4.7	926	6.0	3.3	2.3	1.7	1.7	1.5	2.0
13	2.5	2.4	2.7	4.6	481	5.9	3.2	2.3	1.7	1.7	1.5	2.0
14	2.5	2.4	2.7	4.5	e98	5.8	3.1	2.3	1.7	1.7	1.5	2.0
15	2.4	2.4	2.8	5.3	e39	5.8	3.1	2.3	1.7	1.7	1.4	2.0
16	2.4	2.4	2.8	5.3	e24	5.7	3.0	2.3	1.8	1.7	1.4	2.0
17	2.4	2.4	2.8	5.3	e18	5.6	2.9	2.3	1.8	1.6	1.4	2.0
18	2.4	2.4	2.8	5.1	14	5.5	3.0	2.2	1.8	1.7	1.3	1.9
19	2.4	2.3	2.8	5.1	18	5.3	3.0	2.2	1.7	1.6	1.3	1.9
20	2.3	2.3	2.9	5.0	113	5.3	2.9	2.2	1.6	1.6	1.3	1.9
21	2.4	2.3	3.0	5.0	142	5.1	2.9	2.2	1.7	1.7	1.3	1.9
22	2.4	2.9	3.0	4.9	47	5.0	2.9	2.1	1.6	1.7	1.3	1.9
23	2.4	2.5	3.0	4.8	24	4.8	2.9	2.1	1.6	1.6	1.3	1.9
24	2.3	2.4	3.0	4.8	16	4.6	3.1	2.1	1.7	1.7	1.3	1.9
25	2.3	2.4	3.0	4.8	13	4.7	3.0	2.1	1.7	1.6	1.3	1.9
26	2.3	2.4	3.1	4.9	12	4.8	3.0	2.1	1.7	1.7	1.4	1.9
27	2.3	2.4	3.1	5.2	11	4.7	2.9	2.0	1.7	1.7	1.4	1.9
28	2.3	2.4	3.1	5.1	9.8	4.5	2.9	2.0	1.7	1.7	1.5	2.0
29	2.3	2.4	3.1	4.9	---	4.3	2.9	2.0	1.7	1.7	1.5	1.9
30	2.3	2.4	3.2	4.8	---	4.0	2.9	2.0	1.7	1.7	1.5	2.0
31	2.3	---	3.3	5.0	---	3.7	---	2.0	---	1.7	1.5	---
TOTAL	73.4	71.7	87.7	167.7	2073.3	183.4	96.4	70.9	52.4	52.2	45.2	56.7
MEAN	2.37	2.39	2.83	5.41	74.0	5.92	3.15	2.29	1.75	1.68	1.46	1.89
MAX	2.5	2.9	3.2	15	926	9.3	3.6	2.8	1.9	1.7	1.7	2.0
MIN	2.3	2.3	2.5	3.3	4.8	3.7	2.9	2.0	1.6	1.6	1.3	1.5
AC-FT	146	142	174	333	4110	364	187	141	104	104	90	112
CFSM	0.01	0.01	0.01	0.02	0.25	0.02	0.01	0.01	0.01	0.01	0.00	0.01
IN.	0.01	0.01	0.01	0.02	0.26	0.02	0.01	0.01	0.01	0.01	0.01	0.01

STATISTICS OF MONTHLY MEAN DATA FOR WATER YEARS 1982 - 2005, BY WATER YEAR (WY)

MEAN	13.0	6.22	8.89	46.2	26.9	12.8	4.86	3.80	3.07	6.44	7.15	7.04
MAX	176	21.7	29.6	769	165	53.6	10.7	6.33	5.86	44.5	14.6	28.6
(WY)	1984	1995	1983	1993	1993	1995	1998	1993	1995	1999	2000	1996
MIN	1.52	1.86	2.26	3.43	2.71	2.74	2.00	2.10	1.32	1.68	1.46	1.20
(WY)	1992	1992	2004	2004	2004	2001	1991	1991	1983	2005	2005	2003

SUMMARY STATISTICS	FOR 2004 CALENDAR YEAR		FOR 2005 WATER YEAR		WATER YEARS 1982 - 2005	
ANNUAL TOTAL	984.5		3029.0			
ANNUAL MEAN	2.69		8.30		12.2	
HIGHEST ANNUAL MEAN					83.7	1993
LOWEST ANNUAL MEAN					2.54	2004
HIGHEST DAILY MEAN	7.0	Aug 18	926	Feb 12	10200	Jan 19 1993
LOWEST DAILY MEAN	1.4	Aug 7	1.3	Aug 18	0.7	Dec 21 1982
ANNUAL SEVEN-DAY MINIMUM	1.5	Aug 1	1.3	Aug 18	0.77	Aug 26 1988
ANNUAL RUNOFF (AC-FT)	1950		6010		8810	
ANNUAL RUNOFF (CFSM)	0.009		0.027		0.040	
ANNUAL RUNOFF (INCHES)	0.12		0.37		0.55	
10 PERCENT EXCEEDS	3.8		4.3		8.5	
50 PERCENT EXCEEDS	2.4		2.4		4.3	
90 PERCENT EXCEEDS	2.0		1.6		2.2	

e Estimated

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09468500 SAN CARLOS RIVER NEAR PERIDOT, AZ

LOCATION.--Lat 33°17'47", long 110°27'03", in SE¼ sec. 36, T.1 S., R.18 E. (unsurveyed), Gila County, Hydrologic Unit 15040007, in San Carlos Indian Reservation, on U.S. Highway 70 bridge, 0.9 mi south of Peridot.

DRAINAGE AREA.--1,026 mi^2.

PERIOD OF RECORD.--Aug. 1910 to Jan. 1911 (gage heights only), Apr. 1914 to July 1915, Aug. to Sept. 1915 (monthly discharge only), Oct. 1929 to current year. Prior to Oct. 1929 published as "at San Carlos."

REVISED RECORDS.--WSP 1283: Drainage area.

GAGE.--Water-stage recorder. Datum of gage is 2,542.29 ft above sea level (AZ Highway Department benchmark). See WSP 1713 or 1733 for history of changes prior to Feb. 1, 1942. Feb. 1, 1942, to Aug. 13, 1970, at sites 1.9 mi upstream at different datums. Aug 14, 1970, to Sept. 30, 1980, at site 1.8 mi upstream at datum 2,578.90 ft. above sea level. Supplementary water-stage recorder Dec. 21, 1967, to July 2, 1968, at site 2.2 mi downstream at datum in use prior to Feb. 1, 1942; Jan. 31, 1979, to Sept. 30, 1980, at present site and datum.

REMARKS.--Records fair except for estimated daily discharges, which are poor. Diversions above station for irrigation of about 600 acres. Small inflow from sewage treatment system about 3.6 mi upstream. Flow regulated to some extent since June 15, 1979, by Talkalai Reservoir, capacity, about 6,000 acre-ft.

EXTREMES FOR PERIOD OF RECORD.--Maximum discharge, 54,800 ft^3/s Jan. 8, 1993, gage height, 12.12 ft, from rating curve extended above 23,000 ft^3/s on basis of rate of change in storage in San Carlos Reservoir; maximum gage height 14.8 ft, Dec. 22, 1965, site and datum then in use; no flow at times in most years.

EXTREMES FOR CURRENT YEAR.--Peak discharges greater than base discharge of 2,200 ft^3/s and (or) maximum (*):

Date	Time	Discharge (ft^3/s)	Gage height (ft)
Jan. 5	0215	5,450	8.79
Feb. 12	1745	*20,000	*11.46
Feb. 20	0930	10,200	9.91

Minimum daily discharge, no flow for many days.

DISCHARGE, CUBIC FEET PER SECOND, WATER YEAR OCTOBER 2004 TO SEPTEMBER 2005
DAILY MEAN VALUES

DAY	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP
1	0.00	0.00	0.00	96	134	92	15	7.3	0.00	0.00	0.00	0.23
2	0.00	0.00	0.00	46	104	67	14	7.0	0.00	0.00	81	0.00
3	0.00	0.00	0.00	34	87	55	14	7.0	0.00	0.00	21	0.00
4	0.00	0.00	0.00	1990	69	47	14	6.9	0.00	0.00	0.00	0.00
5	0.00	0.00	0.00	2430	59	48	12	6.4	0.00	0.00	50	0.00
6	0.00	0.00	0.00	409	50	98	11	5.8	0.00	0.00	0.00	0.00
7	0.00	0.00	e0.84	228	46	231	11	5.0	0.00	0.00	3.8	0.00
8	0.00	0.00	e1.5	164	68	117	10	3.3	0.00	0.00	0.00	0.00
9	0.00	0.00	e2.7	128	101	66	11	2.9	0.00	0.00	0.00	0.00
10	0.00	0.00	3.3	109	81	50	11	2.4	0.00	0.00	0.00	0.00
11	0.00	0.00	6.7	93	491	42	11	1.9	0.00	0.00	0.00	0.00
12	0.00	0.00	8.2	76	12000	34	10	1.4	0.00	0.00	2.0	0.00
13	0.00	0.00	9.3	69	3530	30	10	1.4	0.00	0.00	5.6	0.00
14	0.00	0.00	11	67	777	27	10	1.2	0.00	0.00	0.00	0.00
15	0.00	0.00	14	58	371	24	9.7	1.1	0.00	0.00	0.00	0.00
16	0.00	0.00	15	50	264	21	9.8	0.96	0.00	0.00	0.00	0.00
17	0.00	0.00	17	42	198	21	10	0.94	0.00	0.00	0.00	0.00
18	0.00	0.00	18	37	163	20	9.1	0.92	0.00	0.00	0.00	0.00
19	0.00	0.00	19	31	706	18	8.9	0.93	0.00	0.00	0.00	0.00
20	0.00	0.00	18	28	5180	20	9.1	0.84	0.00	0.00	0.00	0.00
21	0.00	0.00	15	23	1050	19	8.5	0.70	0.00	0.00	0.00	0.00
22	0.00	0.00	15	20	785	18	8.0	0.60	0.00	0.00	0.00	0.00
23	0.00	0.00	18	19	589	19	8.6	0.47	0.00	0.00	0.00	0.00
24	0.00	0.00	15	19	343	19	9.2	0.32	0.00	0.00	0.00	0.00
25	0.00	0.00	15	20	231	19	7.9	0.24	0.00	0.00	0.00	0.00
26	0.00	0.00	16	25	171	18	8.0	0.18	0.00	0.00	0.00	0.00
27	0.00	0.00	17	33	157	19	7.7	0.03	0.00	0.00	0.00	0.00
28	0.00	0.00	19	342	130	18	6.9	0.00	0.00	0.00	0.00	0.00
29	0.00	0.00	36	206	---	17	6.6	0.00	0.00	0.00	0.00	0.00
30	0.00	0.00	316	145	---	17	7.0	0.00	0.00	0.00	0.00	0.00
31	0.00	---	256	147	---	17	---	0.00	---	0.00	0.00	---
TOTAL	0.00	0.00	881.94	7182	27935	1326	299.0	68.33	0.00	0.00	162.00	0.23
MEAN	0.00	0.00	28.4	232	998	42.8	9.97	2.20	0.00	0.00	5.23	0.01
MAX	0.00	0.00	316	2430	12000	231	15	7.3	0.00	0.00	81	0.23
MIN	0.00	0.00	0.00	19	46	17	6.6	0.00	0.00	0.00	0.00	0.00
AC-FT	0.00	0.00	1750	14250	55410	2630	593	136	0.00	0.00	321	0.6
CFSM	0.00	0.00	0.03	0.23	0.97	0.04	0.01	0.00	0.00	0.00	0.01	0.00
IN.	0.00	0.00	0.03	0.26	1.01	0.05	0.01	0.00	0.00	0.00	0.01	0.00

STATISTICS OF MONTHLY MEAN DATA FOR WATER YEARS 1930 - 2005, BY WATER YEAR (WY)

MEAN	27.6	19.3	99.7	138	170	140	23.2	7.47	3.46	17.5	49.7	23.8
MAX	519	178	1581	3208	1500	1262	170	41.8	19.8	84.6	320	166
(WY)	1973	1979	1966	1993	1980	1941	1941	1980	1993	1930	1990	1983
MIN	0.00	0.00	5.07	5.80	7.03	4.83	2.17	0.03	0.00	0.00	0.29	0.00
(WY)	2003	2005	1951	1958	1953	1959	1959	2004	1948	1947	2003	1956

SUMMARY STATISTICS	FOR 2004 CALENDAR YEAR		FOR 2005 WATER YEAR		WATER YEARS 1930 - 2005	
ANNUAL TOTAL	4107.62		37854.50			
ANNUAL MEAN	11.2		104		59.6	
HIGHEST ANNUAL MEAN					436	1993
LOWEST ANNUAL MEAN					6.61	2002
HIGHEST DAILY MEAN	779	Mar 6	12000	Feb 12	20000	Jan 8 1993
LOWEST DAILY MEAN	0.00	May 1	0.00	Oct 1	0.00	Jun 16 1930
ANNUAL SEVEN-DAY MINIMUM	0.00	May 3	0.00	Oct 1	0.00	Jun 24 1930
ANNUAL RUNOFF (AC-FT)	8150		75080		43200	
ANNUAL RUNOFF (CFSM)	0.011		0.101		0.058	
ANNUAL RUNOFF (INCHES)	0.15		1.37		0.79	
10 PERCENT EXCEEDS	15		97		65	
50 PERCENT EXCEEDS	0.00		0.00		9.5	
90 PERCENT EXCEEDS	0.00		0.00		0.50	

e Estimated